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The Josiah Philips Attainder and the Institutional Structure of the American Revolution

MATTHEW STEILEN*

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ABSTRACT

This Article is a historical study of the Case of Josiah Philips. Philips led a gang of militant loyalists and escaped slaves in the Great Dismal Swamp of southeastern Virginia during the American Revolution. He was attainted of treason in 1778 by an act of the Virginia General Assembly, tried for robbery before a jury, convicted and executed. For many years, the Philips case was thought to be an early example of judicial review, based on a claim by St. George Tucker that judges had refused to enforce the act of attainder. Modern research has cast serious doubt on Tucker's claim. This Article draws on period sources to establish what we know about Philips' activities and to argue for the case's continuing importance. In particular, the Philips case is a rich illustration of wartime justice and the development of a doctrine of separation of powers. Edmund Randolph, Attorney General and then Governor of Virginia (and the first Attorney General of the United States), regarded Philips' fate as evidence of the danger of a legislative power to summarily convict for treason. Another Virginia Governor, Patrick Henry, thought such a power essential in a legislature and argued that Philips had received his due as a bandit under principles of international law. It was this suggestion that may have led St. George Tucker to describe Virginia judges as refusing to enforce the act, since there were difficult legal questions about Philips's status under international law. The Article explores these questions in some detail, and concludes by connecting them to broader changes in American understandings of legislative power and its relation to law.

INTRODUCTION

Josiah Philips was a bandit—a terrorist, we would say—who led a gang of militant loyalists and escaped slaves in the Great Dismal Swamp of Virginia during the American Revolution. In the summer of 1778, the Virginia General Assembly passed a bill attainting him of treason, drafted by none other than Thomas Jefferson.¹ Traditionally, a “bill of attainder” condemned someone to death for a widely-known

1. An act to attaint Josiah Philips and others, unless they render themselves to justice within a certain time, c.12, 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 463–64 (William Waller Hening ed., 1821) [hereinafter VA STATUTES AT LARGE]; *Bill to Attaint Josiah Philips and Others*, in 2 THE PAPERS OF THOMAS JEFFERSON 189–90 (Julian P. Boyd ed., 1950) [hereinafter *Bill to Attaint*].

treason in conditions where courts of law were incapable of reaching the offender.² Jefferson's bill contained a grace period, and Philips was captured before it ended, sparing him an immediate death sentence. Instead, he was indicted for robbery, tried before a jury, convicted and executed as a felon.³

In the years that followed, the case took on an air of mystery. The men involved (and some uninvolved) made a series of baffling and contradictory claims about just what had happened to Philips. In the opening days of the 1788 Virginia ratifying convention, where delegates debated a proposed federal Constitution, Edmund Randolph suggested that Philips had been executed pursuant to the act of attainder, despite the fact that Randolph *himself* had prosecuted Philips for robbery as the state's attorney general.⁴ Patrick Henry conceded the claim, though he had been intimately involved in the Philips affair and must have known what had happened, and though his concession bolstered the case for ratifying a Constitution he bitterly opposed.⁵ Some years after that, the eminent Virginia jurist, St. George Tucker, stated in his annotated edition of Blackstone's *Commentaries* that judges had refused to enforce the act of attainder, making the case one of the earliest instances of what we now call "judicial review."⁶ But when, decades after *that*, Thomas Jefferson learned of the claims of Tucker, Randolph, and Henry, he angrily denied them all, asserting that Philips had been captured after the grace period, and that then-Attorney General Randolph had decided not to seek execution under the act.⁷ Judge Tucker, he wrote misreported the case in an effort to compose a "diatribe" against bills of attainder.⁸

A dread of wandering into this morass, and a sense that someone has irretrievably contaminated the record by, well, *lying*, has led the

2. Matthew J. Steilen, *Bills of Attainder*, 53 Hous. L. Rev. 767, 890–94 (2016). Widely known crimes were said to be "notorious," and their prosecution could proceed on the basis of what commentators call "manifest proofs." JOHN M. COLLINS, *MARTIAL LAW AND ENGLISH LAWS, c. 1500 – c. 1700*, at 19, 21 (2016).

3. Jesse Turner, *A Phantom Precedent*, 48 AM. L. REV. 321, 322–23 (1914).

4. See *infra* Part II.A. On Attorney General Randolph's prosecution of Philips, see Trent, *infra* note 74, at 450–51.

5. See *infra* note 74.

6. 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA* 293 (1803) [hereinafter TUCKER, *BLACKSTONE'S COMMENTARIES*].

7. See *infra* Part II.C.

8. *Letter from Thomas Jefferson to Louis H. Girardin (Mar. 12, 1815)*, in 8 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 337 (J. Jefferson Looney ed., 2011) [hereinafter *Girardin Letter*].

Case of Josiah Philips to lie dormant for some time.⁹ This is a mistake. It is a rich and important case. It has much to tell us about the allocation of governmental authority during periods of armed conflict, or what we might call the “institutional structure” of conflict. Today the President and political leadership of the United States Armed Forces largely control the timing and terms of conflict, but this is usually thought to be an institutional structure that has emerged over time.¹⁰ Indeed, the Philips case reveals a very different structure at work, and the controversy that followed the case reveals a range of opinions, on the eve of ratification and in the first decades afterwards, about just how to separate governmental powers during war.

Take these points one at a time. First, the Philips attainder illustrates how state legislatures and their committees exercised significant legal powers during the war, ordering arrests, mass removals, confiscations and even executions pursuant to summary proceedings they conducted. The bill of attainder was one such summary proceeding.¹¹ Its use reflects the view of some in the founding generation that the as-

9. Most of the important historical work on the case is now over 100 years old. See H. J. ECKENRODE, *THE REVOLUTION IN VIRGINIA* 66, 191–92 (1916); W. P. Trent, *The Case of Josiah Philips*, 1 *AM. HIST. REV.* 444 (1896); Turner, *supra* note 3, at 323. Hamilton Eckenrode was an archivist with the Virginia State Library and claimed to base his account on an examination of state records. I utilize Eckenrode’s history below. Jesse Turner was a progressive historian, and his interest in the case grew from Judge Tucker’s suggestion that it had involved judicial review. Another treatment of the case by a progressive constitutional historian is CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 77–80 (1959), but Haines’s work is essentially derivative. The only recent studies of the Philips attainder are LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 72–77 (1999); 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 944, 945 (1953). Both Crosskey and Levy have axes to grind, however, and this limits the usefulness of their work. Crosskey is consumed with winnowing the list of early state-court ‘precedents’ for judicial review, and rather liberal with his accusations of mendacity; Levy’s views are colored by a very palpable dislike of Jefferson. The Bill of Attainder Clauses and the Philips case are also discussed in Jay Wexler’s light-hearted book, *THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS* 157–76 (2011), an account influenced by Levy (minus the bile).

10. For recent work in this line, see BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 43–64 (2010); STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 17–18 (2013); SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 142–70 (2015); David J. Barron & Martin S. Lederman, *The Commander in Chief at Lowest Ebb—A Constitutional History*, 121 *HARV. L. REV.* 941, 946–49, 951–80 (2008) [hereinafter Barron & Lederman, *Commander in Chief*]; David J. Barron & Martin S. Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *HARV. L. REV.* 689, 712, 772–99 (2008); Mark E. Brandon, *War and the Constitutional Order*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 21–24 (Mark Tushnet ed., 2005); John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 *TEMP. L. REV.* 599, 608–25 (2011).

11. Steilen, *supra* note 2, at 889–96.

sembly was the central repository of sovereignty in a republic and thus had critical legal functions in wartime. Bills of attainder are now banned by the Constitution, but Congress retains a power to constitute commissions and similar summary proceedings where armed conflict has frustrated the course of civil justice.¹² Modern accounts of legislative power tend to obscure the legal character of much that traditionally occurred in legislative bodies, as well as persistent disagreements about what the limits of ‘legislative’ power should be.¹³ These disputes have continued well into the present age. Just last term, for example, the Supreme Court reaffirmed Congress’ power to pass a bill that prescribed a rule “for a single, pending case” thought to implicate national security interests.¹⁴ Philips’s attainder reflects a set of background conventions against which such ‘legislative’ powers are intelligible.¹⁵

12. For the ban on bills of attainder, see U.S. CONST., art. I, § 9, cl. 3; *United States v. Brown*, 381 U.S. 437, 441 (1965). On Congress’s authority to establish military commissions where civil courts are closed, and to define the law such bodies apply, see Art. I, § 8, cl. 10–11, 14–16, 18; *Hamdan v. Rumsfeld*, 548 U.S. 557, 591–92 (2006); *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946); see generally 2 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 1295–1321 (2d ed. 1896) (describing historical uses of military commissions).

13. The legal activities of wartime state legislatures look a lot like those of early eighteenth-century colonial assemblies, complicating a standard historical narrative about their institutional development. See, e.g., MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 58 (1943) (judicial powers of assemblies “were exercised now and then up to the Revolution . . . [but] activity of this sort tended to be less common as the colonies advanced”); MICHAEL KAMMEN, *DEPUTIES AND LIBERTIES: THE ORIGINS OF REPRESENTATIVE GOVERNMENT IN COLONIAL AMERICA* 57 (1969) (lower houses “largely shed their early exercise of broad judicial powers” at the end of the seventeenth century); Alison Olson, *Eighteenth-Century Colonial Legislatures and their Constituents*, 79 J. AM. HIST. 543, 556 (1992) (describing a shift away from judicial proceedings towards “legislative action” after mid-eighteenth century). For accounts that feature adjudication in eighteenth-century colonial assemblies, see MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 77–83 (2004) (equity); Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1404, 1407 (1998) (treasury).

14. *Bank Markazi v. Peterson*, No. 14-770, slip. op. at 19 (S. Ct. Apr. 20, 2016). Except for impeachment, most of Congress’s quasi-legal powers are skipped over in a standard Constitutional Law class. Thus, for example, Congress exercises powers to issue compulsory process summoning witnesses and requesting the production documents (backed by contempt), and to conduct investigations as part of its oversight of government. For an introduction, see MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI ET AL., *THE CONSTITUTION OF THE UNITED STATES* 247–57, 283–96 (2d ed. 2013). Early Congresses received a significant number of petitions and passed private bills in response. See, e.g., James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1888–92 (2010).

15. These conventions are historical and institutional, rather than functional. See William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 265–66 (1989) (“[T]he terms ‘legislative’ and ‘executive’ power . . . refer, not to single governmental functions, but to a variety of functions exercised by the two houses of Parliament on the one hand and those exercised by the monarch, his officials, and his advisors, on the other.”).

Second, the subsequent dispute about the Philips case illustrates the complexity of judicial efforts to check the prosecution of loyalists by enforcing the state law of treason and international, customary laws of war. One of the central questions raised in the case was whether Philips was a prisoner of war and entitled to protection under the laws of war. Virginia judges may have blocked his prosecution for treason on this basis (we can't know for certain), but boundaries between treason and other crimes were permeable, and a felony prosecution under domestic law was allowed to go forward.¹⁶ The result points to a willingness of early state courts to question the legal status of individuals in war, but also to the intrinsic difficulty of these issues.¹⁷ Political membership and legal status were central to Virginians' efforts to govern and protect themselves, and the importance of these issues explains why the Philips affair came up, ten years after his execution, at the 1788 Virginia ratifying convention. The delegates' dispute thereby gives the Case of Josiah Philips a significance not unlike the extradition of Thomas Nash in 1799 or even the Neutrality Controversy of 1793.¹⁸

16. It thus overstates matters to say, as have two distinguished commentators, that "[i]n 1789, war was a fundamental concept in public international law—sharply distinguishable from peace—to which particular legal consequences attached. During war, elaborate rules of belligerency governed relations between warring states." Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2047, 2059 (2005) (internal quotation marks and citation omitted).

17. These concerns have led some modern judges to disavow an authority to inquire into a prisoner's status altogether. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 585–86 (2004) ("[T]he question whether Hamdi is actually an enemy combatant is of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." (internal quotation marks and citation omitted) (Thomas, J., dissenting). Although Justice Thomas's opinion is a dissent, the 'fate' of *Hamdi* as administered by the D.C. Circuit has arguably produced a result not like the one Thomas thought appropriate. See PAUL BREST & SANDFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 1071–72 (6th ed. 2014).

18. The Nash affair may not be known to all constitutional lawyers. Nash was allegedly a British seaman. The British charged him with mutiny aboard a British ship. He was taken into custody by the Americans and the British requested his extradition. President Adams asked the federal judge with jurisdiction over Nash to deliver him, and the judge held a *habeas* hearing, at which Nash claimed to be an American by the name of Jonathan Robbins—a claim that may have been true. The judge transferred him anyway and Nash (or Robbins) was executed soon after, causing an uproar. See David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 304–14 (1992); Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367 (1999); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 304 (1990). The Neutrality Controversy is a central episode in today's separation of powers canon, and there is an immense literature on the event. For recent commentary, see HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 42–47 (2015); GRIFFIN, *supra* note 10, at 18–23; WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 19–35, 59–102 (2006).

I propose, then, to revisit the case, and my study will have four parts. In Part I, I draw on legislative records, executive records, newspapers, letters and early histories to determine what we know about Josiah Philips and his attainder. Unlike prior commentators, I situate Jefferson's bill of attainder within the English legal tradition from which it originated. The bill's clear place in this tradition, its proper uses as described in the parliamentary treatises and other law books on which Jefferson typically drew, and evidence that others in the General Assembly accepted these uses, suggests that most of those involved thought it lawful for the assembly to attain Philips. The question then becomes why some Virginians were uncomfortable with it.

In Part II, I examine the statements of Randolph, Henry, Jefferson and Tucker that have been the source of much of the mystery surrounding the case. Setting each statement in the shifting constitutional surround, I argue that the mystery is largely a result of re-telling the story over time, adjusting emphasis and filling gaps in accordance with purposes and assumptions then dominant. Thus, as I read the Randolph-Henry exchange at the 1788 Virginia ratifying convention, the two men shared a belief that republican assemblies *should* possess legal powers, but disagreed as to the *form* and *scope* of those powers.¹⁹ Neither man seems to have thought this allocation inconsistent with the vaunted separation of powers provision in the 1776 state constitution.²⁰ Randolph's discomfort grew, rather, from a sense that emergency proceedings in the assembly corrupted the ordinary course of law. Yet, that the state's assembly should be denied residual powers to do justice and to protect Virginia citizens was a difficult proposition to sustain. These were textbook examples of royal prerogative power, and in a republic, the popular assembly was arguably their nat-

19. Randolph supported a council of revision, which he conceived as a kind of legislative mechanism for judicial review. See *infra* Part II.D, note 131, and accompanying text.

20. *Declaration of Rights, § 5*, in 2 BEN: PERLEY POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* 1909 (1877) ("Sect. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary . . ."). For representative readings of this section, see WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 267 (2001 ed.) ("Virginia's constitution of June 1776 was the first constitutional document since the *Instrument of Government* . . . to include the principle of separation of powers in express terms. It did so with a clarity that no previous statement of either theory or practice had achieved."); SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606 –1787*, at 61 (2011) (similar).

ural home.²¹ Indeed, state assemblies continued to exercise residual legal powers and to interfere in the proceedings of courts well into the nineteenth century, despite judicial efforts to check the practice using due process principles.²²

With this context, I turn in Part III to St. George Tucker's claim that Virginia judges refused to enforce the act of attainder. The claim has long been regarded as erroneous, due to Philips's capture before the end of the grace period in the act.²³ I argue that Tucker may have been correct. Were Philips to be timely taken into custody, the act of attainder required that he be tried for treason, and trying a loyalist for treason in a civil conflict like the Revolution raised serious legal difficulties. Treason required *allegiance*; did Philips owe Virginia allegiance? He claimed to hold a British military commission, which would have made him a belligerent, not a traitor. The laws of war required that Virginia hold belligerents as prisoners of war.²⁴ Was Philips a member of the Virginia political community, then, or was he a foreign subject? Or was he outside *both* communities, an outlaw, or like one of the escaped slaves in his gang? Courts in states with significant loyalist populations struggled with these questions during the

21. On the prerogative source of the obligations to do justice and to protect subjects, see 2 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 6, at 262, 266–68 (1803). On the place of royal prerogative in American state and national governments in this period, see KATHLEEN BARTOLONI-TUAZON, FOR FEAR OF AN ELECTIVE KING: GEORGE WASHINGTON AND THE PRESIDENTIAL TITLE CONTROVERSY OF 1789, at 57–64 (2014); BILDER, *supra* note 13, at 73–83; MARKUS DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 83–85 (2005); JERRILYN GREENE MARSTON, KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774–1776, at 20–31, 34 (1987); BRENDAN MCCONVILLE, THE KING'S THREE FACES: THE RISE AND FALL OF ROYAL AMERICA, 1688–1776, at 303 (2006); ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 149 (2014); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 85–99 (abr. ed. 1995); Matthew Crow, *Thomas Jefferson and the Uses of Equity*, 33 LAW & HIST. REV. 153, 168–69 (2015); Jack N. Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 PRES. STUDS. Q. 85, 89–90 (2007).

22. See generally JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 45–46 (2003); JOHN PHILLIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 3–17 (2009); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1703–26 (2012); Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 126–28 (1956). Other early constitutional 'hooks' for this effort were the Ex Post Facto Clauses. See Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WISC. L. REV. 727, 753–67, and the Contract Clause, see also 3–4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 595–673 (1988).

23. See, e.g., CROSSKEY, *supra* note 9, at 944; Turner, *supra* note 3.

24. E.g., EMER DE VATTTEL, THE LAW OF NATIONS, bk.III, ch.VIII, ss.140, 149, at 347–48, 354–55 (tr. 1797) (1896); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lec. V, at 88–89 (1826); see STEPHEN C. NEFF, JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW 147–51, 163–65, 194–98 (2014); JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 16–23 (2012).

Revolution.²⁵ Some lawyers like St. George Tucker among them, urged state courts to enforce the protections in state constitutions and the law of nations, investing those bodies with a “national security” function like that of the early federal courts.²⁶ Yet lawyers also made opportunistic use of domestic criminal law, and state courts permitted prosecutions for ordinary felonies, at least on occasion, rather than require proceedings under military jurisdiction on charges of war crime.

Finally, in Part IV, I step away from the case, and argue that changes in the understanding of the bill of attainder tracked changes in the understanding of the popular assembly itself. The idea that a bill of attainder was a summary *legal* procedure suited to times of civil disorder was not uncommon in the 1760s and 1770s, at least among well-read lawyers. But by the mid-1780s, bills of attainder were often described as arbitrary exercises of *legislative* power. This framing would better justify courts of law in enforcing bans on bills of attainder, since, as Hamilton put it, “specific exceptions to the legislative authority . . . can be preserved in practice no other way than through the medium of the courts.”²⁷ On these grounds courts of law would claim not only a power void acts of attainder passed by the legislature, but more generally to superintend legislative decisions about when summary procedures could be used in place of the common law.

I. JOSIAH PHILIPS CIRCA 1778

The Josiah Philips gang was not unique in the Revolutionary War period, although its methods were not widely representative either. More often, resistance in loyalist strongholds probably looked like Queens, New York, where the disaffected ignored the orders of the ad

25. See BRADLEY CHAPIN, *THE AMERICAN LAW OF TREASON* 46–80 (1964); CLAUDE HALSTEAD VAN TYNE, *THE LOYALISTS IN THE AMERICAN REVOLUTION* 268–85 (1902). Leading examples are New York and Pennsylvania. On New York in particular, see DANIEL HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 111–69 (2005); On Pennsylvania, see Henry J. Young, *Treason and Its Punishment in Revolutionary Pennsylvania*, PA. MAG. HIST. & BIO. 287, 298 (1966); Steilen, *supra* note 2, at 857–89.

26. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC* 71, 130–41 (1995) [hereinafter Casto, *SUPREME COURT*]; see also Barron & Lederman, *Commander in Chief*, *supra* note 10, at 952–55, 963, 967–70; Dehn, *supra* note 10, at 616–25. Another framing of this role for courts is that they functioned to promote *vigorous* or *good government*, ‘protecting’ government from anarchy by enforcing respect for acts. See, e.g., 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 634 (1971).

27. See *infra* note 187.

hoc ‘Whig’ assemblies attempting to govern, and the militant welcomed or even joined the invading British army.²⁸ Elsewhere loyalism mixed with a kind of organized crime. In Maryland, for example, on the eastern shore of Chesapeake Bay, Hamilton Callilo and Thomas Moore led a gang engaged in “piracy and robbery mixed with loyalism,” for which Callilo was made an outlaw.²⁹ In Pennsylvania, the Doan family robbed tax collectors and destroyed state property into the 1780s, for which several members were also outlawed.³⁰ The Nugent and Shockey gang made a name for itself in robbery and counterfeiting, offenses to which a number of loyalist syndicates became dedicated.³¹ From the perspective of the new state governments formed in 1776 and 1777, these militant, criminal loyalists posed a serious challenge. States like New York, Pennsylvania and Virginia struggled to administer civil justice and protect citizens across their expansive territories, and in some cases militants were able to operate in essentially ungoverned areas. As we will see in Philips’s case, it was militants’ presence in those spaces—where civil process did not run and magistrates could not police—that required the use of institutions like outlawry and attainder.³²

Philips was a laborer from Lynhaven Parish, in the very southeast portion of Virginia.³³ He became disaffected with the movement towards independence. In August 1775, he was seen “command[ing] an ignorant disorderly mob, in direct opposition to the measures of this country.”³⁴ Some two years later, in June 1777, Colonel John Wilson, head of the Norfolk County militia, complained of “sundry evil disposed persons, to the number of ten, or twelve,” who were “lurking in secret places threatening and doing actual mischief to the peaceable

28. ALEXANDER CLARENCE FLICK, *LOYALISM IN NEW YORK DURING THE AMERICAN REVOLUTION* 37–57 (1901); ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804*, at 213–16 (2016); VAN TYNE, *supra* note 25, at 87–89.

29. CHAPIN, *supra* note 25, at 59. Outlaws surrendered their protection under the law for failing to appear before a court to answer charges against them. See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 539, 554 (2d ed. 1898); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 580–81 (2d. ed. 1898).

30. *Respublica v. Doan*, 1 U.S. 86, 92–93 (Pa. 1784); ANNE M. OUSTERHOUT, *A STATE DIVIDED: OPPOSITION IN PENNSYLVANIA TO THE AMERICAN REVOLUTION* 213–14 (1987).

31. Henry J. Young, *Treason and Its Punishment in Revolutionary Pennsylvania*, 90.3 PA. MAG. HIST. & BIO. 287, 298 (1966).

32. See *infra* Part I.

33. Trent, *supra* note 9, at 444–45.

34. THIRD VIRGINIA CONVENTION, *PROCEEDINGS OF THE CONVENTION OF DELEGATES FOR THE COUNTIES AND CORPORATIONS IN THE COLONY OF VIRGINIA* (1775).

and well affected Inhabitants” of the area.³⁵ At their head was Josiah Philips.³⁶ Counted among the party, as well, were a number of “run-away slaves,” drawn perhaps by Lord Dunmore’s promise in November 1775 to free slaves who fought for the King.³⁷ Indeed, “irregular armed gangs” of runaways would raid Virginia farms and plantations for the British throughout the Revolution.³⁸ In response to Colonel Wilson’s letter, the state’s Privy Council, an executive council selected by the legislature, recommended that Governor Patrick Henry “issue a proclamation offering a reward” to anyone who apprehended Philips and brought him before a magistrate “to be dealt with according to Law.”³⁹ Philips was captured that winter, only to escape sometime in early 1778.⁴⁰ He proved difficult to recapture, in part because of the geography of the Dismal Swamp, where Philips had his hideout, and in part because of “the disaffection which prevailed in that quarter.”⁴¹ The gang had supporters—or at least few were willing to cross them. By May 1778, they numbered around fifty; a muster of three militia companies to go after Philips raised only ten men, and the expedition failed.⁴² Several days later, the commanding officer was killed in an ambush near his home, being “fired on by four men concealed in [his neighbor’s] house.”⁴³ Colonel Wilson wrote to Governor Henry on May 20, informing him of the attack and complaining of “disaffection” in area residents, who sympathized with “Philips and

35. JOURNALS OF THE COUNCIL OF THE STATE OF VA.: JULY 12, 1776–OCTOBER 2, 1777 at 435 (H.R. McIlwaine ed., 1931) [hereinafter JCS VA: 1776–1777].

36. *Id.* (spelling Philips’s name “Phillips”).

37. ECKENRODE, *supra* note 9, at 66, 191–92 (1916). Slave loyalism was widespread in the Revolution, despite the fact that Dunmore’s promise was not an “official government policy.” MARSTON, *supra* note 21, at 55. There is evidence that slaves in some communities felt a significant attachment to King George, whom they viewed as a benevolent monarch who intended to free his enslaved peoples from the lordship of “local pharaohs.” McCONVILLE, *supra* note 21, at 175–76, 181–82. Among the local pharaohs, of course, were members of the Virginia planter class now leading an American Revolution.

38. ALAN TAYLOR, *THE INTERNAL ENEMY: SLAVERY AND WAR IN VIRGINIA, 1772–1832*, at 27, 41 (2013) [hereinafter TAYLOR, *INTERNAL ENEMY*]. After the revolution, as well—and especially following the bloody revolt in Saint-Domingue (modern-day Haiti)—white Virginians lived in fear of slave revolts, many imagined but some very real. *See id.* at 86–87, 89–97.

39. JCS VA.: 1776–1777 *supra* note 35, at 435–36.

40. 2 JOURNALS OF THE COUNCIL OF THE STATE OF VA.: OCTOBER 6, 1777–NOVEMBER 30, 1781 58 (H.R. McIlwaine ed., 1932) [hereinafter JCS VA: 1777–1781]; *Bill to Attaint*, *supra* note 1, at 192; ECKENRODE, *supra* note 9, at 191.

41. WILLIAM WIRT, *Letter from County Lieutenant John Wilson to Patrick Henry (May 20, 1778)*, in *SKETCHES OF THE LIFE OF PATRICK HENRY* 217 (1817). The Dismal Swamp was the location of “the largest and longest-lived runaway community” of slaves. TAYLOR, *INTERNAL ENEMY*, *supra* note 38, at 76.

42. JCS VA.: 1777–1781, *supra* note 40, at 127; WIRT, *supra* note 41, at 235–36.

43. WIRT, *supra* note 41, at 218.

his notorious gang.”⁴⁴ The fate suffered by the commanding officer would surely visit others, he predicted, unless “the relations and friends of those villains” were removed from the area.⁴⁵

Henry received Wilson’s letter several days later and shared it immediately with Jefferson, who was then a leading member of the House of Delegates.⁴⁶ According to Jefferson, “we both thought the best proceeding would be by bill of attainder.”⁴⁷ Around the same time, Henry showed the letter to the Privy Council, which advised the governor to forward the letter to the legislature and to order a company of regulars to the area “to cooperate with the Militia in crushing these Desperadoes.”⁴⁸ James Madison was among the councilors.⁴⁹ On May 27, Henry sent the correspondence to Benjamin Harrison, then Speaker of the lower house.⁵⁰ The governor’s cover letter described an “insurrection in Princess Anne and Norfolk,” which he had sought, unsuccessfully, to “quell” using the county militias. Colonel Wilson had requested that the governor “remov[e] such families as are in league with the insurgents,” but, Henry continued, “thinking that the executive power is not competent to such a purpose, I must beg leave to submit the whole matter to the assembly, who are the only judges how far the methods of proceeding directed by law are to be dispensed with on occasion.”⁵¹ Asking the assembly to authorize the removal contrasted with Henry’s conduct nine months earlier, when on the advice of his council he had promptly removed disaffected and “suspected” persons, and been indemnified by the assembly later.⁵²

44. *Id.*

45. *Id.*

46. *Letter from Thomas Jefferson to William Wirt (Aug. 14, 1814)*, in 7 *THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES* 548–49 (J. Jefferson Looney ed., Princeton Univ. Press 2010) (1743–1836) [hereinafter *Wirt Letter, 1814*]

47. *Id.*

48. JCS VA.: 1777-1781, *supra* note 40, at 140; Trent, *supra* note 9, at 446.

49. Turner, *supra* note 3, at 329–30. Other members of the council included Dudley Digges, John Blair, Nathaniel Harrison, David Jameson and John Page. RALPH LOUIS KETCHAM, *JAMES MADISON: A BIOGRAPHY* 79 (1st ed. 1990). Ketcham lists Blair among the councilors “present when Madison took his seat” on January 14, 1778, although Blair was appointed to a judgeship on the General Court shortly thereafter, on January 23, 1778. *See infra* note 99 and accompanying text.

50. WILLIAM WIRT, *Letter from Patrick Henry to Benjamin Harrison (May 27, 1778)*, in *THE LIFE OF PATRICK HENRY* 219–21 (1817).

51. *Id.*

52. In April 1776, prior to independence, a colonial Committee of Safety had ordered the removal of disaffected persons from Norfolk and Princess Anne, but then retracted its resolution in May. Robert Leroy Hilldrup, *The Virginia Convention of 1776: A Study in Revolutionary Politics* 119 (1935) (unpublished Ph.D. dissertation, University of Virginia) (on file with author). After the appearance of the British navy in the Chesapeake next year, Governor Henry and his council decided to remove disaffected persons from the area; then, in October 1777, the assem-

Speaker Harrison immediately referred Henry's letter to a committee of the whole house "on the state of the commonwealth." That committee deliberated the next morning, May 28, and then reported a resolution the same day.⁵³ What Henry had called an "insurrection," the committee labeled treason. "Information being received," they wrote, "that a certain Philips, with divers others, . . . have levied war against this commonwealth . . . committing murders, burning houses, wasting farms, and doing other acts of enormity, in defiance of the officers of justice," it was resolved that Philips and "his associates, and confederates" should "render themselves to some officer" within June, or "such of them as fail so to do ought to be attainted of high treason."⁵⁴ The assertion that the Philips gang had committed treason by murder and arson incorporated a significant legal claim, namely, that the latter offenses constituted "levying war," one of the ancient varieties of treason.⁵⁵ In the interim, it would be "lawful for any person . . . to pursue and slay, or otherwise to take and deliver to justice . . . Philips, his associates and confederates."⁵⁶ Upon receipt of the resolution, the House appointed Jefferson, along with lawyer John Tyler (later Governor), to a committee to draft a bill. A bill was docketed the same day, May 28, by the clerk of the House, a young Edmund Randolph.⁵⁷

bly indemnified the governor and council for the decision (as they described it) "to remove and restrain, during the imminence of the danger, at a distance from the post and encampments from the [Virginia] militia, and from other places near the ports and harbours of this commonwealth, certain persons whose affections to the American cause were suspected, and more especially such as had refused to give assurance of fidelity and allegiance to the commonwealth." An Act for indemnifying the Governor and Council, and others, for removing and confining Suspected Persons during the late public danger. 1617 Va. Acts 373–74. Jefferson apparently drafted this bill (as he did the Philips attainder). *Bill Indemnifying the Executive for Removing and Confining Suspected Persons (Dec. 16 – 26, 1777)*, in 2 *THE PAPERS OF THOMAS JEFFERSON* 119 (Julian P. Boyd ed., 1950). On the whole, then, Virginia acted both prospectively *and* retroactively to authorize the governor to address security threats posed by loyalists. See MARGARET BURNHAM MACMILLAN, *THE WAR GOVERNORS IN THE AMERICAN REVOLUTION* 83 (1943). Both approaches show an active role for the General Assembly in directing the use of state force. See Barron & Lederman, *Commander in Chief*, *supra* note 10, at 782, 789.

53. See WIRT, *supra* note 41, at 220.

54. *Id.* at 221.

55. What constitutes "levying war" is the subject of the doctrine of "constructive treason." By Chapin's analysis, an *insurrection* (as Henry had called it) would clearly be a form of constructive treason, but murder, arson and robbery might not. CHAPIN, *supra* note 25, at 7; Thomas P. Slaughter, "The King of Crimes": *Early American Treason Law, 1787-1860*, in *LAUNCHING THE "EXTENDED REPUBLIC" THE FEDERALIST ERA 58-78* (Ronald Hoffman & Peter J. Albert eds., 1996). Chapin observes that Virginia accepted the doctrine of constructive treason later in the war, at least in principle. CHAPIN, *supra* note 25, at 174.

56. WIRT, *supra* note 41, at 221.

57. JOURNAL OF THE HOUSE OF DELEGATES OF VA. 34 (May 5, 1777–June 1, 1778); 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1004 n.5 (John P. Ka-

The draft bill, which was preserved and published as part of Jefferson's papers, is relatively unremarkable as an example of attainder. Indeed, its language and function would have been instantly recognizable to a student of parliamentary history—as Jefferson himself was—and it is likely that Jefferson emulated bills he had encountered in his reading.⁵⁸ Over most of its history, the bill of attainder had served as a device for the king and his allies to punish treasonous conduct by great men who were too powerful for the common law courts at Westminster or who could not be reached by their process.⁵⁹ Bill proceeding in Parliament operated as a kind of *summary legal procedure*, in the sense that it enabled the government to convict an individual whose serious criminal conduct was widely known, without the presence of the accused or any presentation of testimonial evidence.⁶⁰ Those involved largely spoke and wrote about bills of attainder as legal proceedings, a view that contrasts markedly with our own, which (if it acknowledges the bill of attainder at all) treats it as an exercise of legislative power. Proponents connected the bill of attainder to a body of continental legal commentary on summary proceedings by describing the widely-known treasons it targeted as “notorious”—an expression that one encounters, remarkably, in sources as various as

minski & Gaspare J. Saladino et al. eds., 1990) [hereinafter “9 DHRC”] (noting that Randolph docketed the bill as clerk).

58. Jefferson would have read of bills of attainder in his study of Hatsell's *Precedents* and Rushworth's *Collections*, among other sources. H. TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 159–60 (1965) (describing Jefferson's study of Rushworth); H.R. DOC. NO. 111–157, at 127 (2011) (quoting Jefferson, “I could not doubt the necessity of quoting the sources of my information, among which Mr. Hatsell's most valuable book is preeminent”); Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study*, 119 U. PA. L. REV. 823, 842 (1971) (recommending the study of “Hatsell's *Precedents of the House of Commons*” and “*Select Parliam'y debates of England and Ireland*”); 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 233 (E. Millicent Sowerby ed., 1953) [hereinafter Sowerby] (including volume 1 of the 1706 edition of the *Statutes at Large*, which indexed the attainders of Jack Cade and Elizabeth Barton); Sowerby, *supra*, at 300 (volume 1 of Pemberton's *History of Tryals*, which described the attainder of Thomas Cromwell, among others). Jefferson could also have studied acts of attainder in Coke's *Third Institute*, in the section on Parliament, but the accounts given there were distorted to some degree by Coke's efforts to elevate the place of the common law above the ‘law and course of Parliament.’

59. Steilen, *supra* note 2, at 775; see also J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* 102–03, 177–205 (1970); ZECHARIAH CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION* 90–161 (1956); COLIN G. C. TITE, *IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND* 16, 83–148 (1974); J.R. Lander, *Attainder and Forfeiture, 1453–1509*, in 2 *HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT, 1399–1603*, at 92–124 (E.B. Fryde & Edward Miller eds., 1970); William Richard Stacy, *The Bill of Attainder in English History* (unpublished Ph.D. dissertation, University of Wisconsin-Madison, 1986) (on file with author).

60. Steilen, *supra* note 2, at 793–96, 802–04, 824–26.

medieval bills of attainder (*notoriement* in Anglo-Norman) and bills passed in eighteenth-century America.⁶¹ Across their long history, bills of attainder generally took two different forms. Some bills of attainder ordered an individual to submit himself to ordinary proceedings at common law, functioning like a kind of parliamentary outlawry.⁶² Modern commentators describe this first form as the “conditional” or “suspensive” attainder. It was suspensive in the sense that the attainted individual’s surrender would suspend his conviction, which might then be reinstated after a common-law proceeding. Anyone who failed to timely surrender would be attainted by force of the act alone, after expiration of a grace period. Other bills of attainder, such as those that applied to the dead, simply pronounced their targets guilty of a notorious offense. Commentators sometimes call this second form the “absolute” attainder.⁶³ Many bills, of course, combined these forms to reach different individuals with different effect.

Jefferson’s bill was a suspensive attainder. It shared much in common with suspensive attainders employed elsewhere during the Revolution, such as Pennsylvania.⁶⁴ Following the committee resolution, the bill alleged that Philips had committed treason. “[C]ontrary to their fidelity,” wrote Jefferson, the gang had “levied war against this Commonwealth,” committing murder, arson and robbery, “and still continue to exercise the same enormities.”⁶⁵ Outlawing Philips, which would require his summons at successive sessions of court over a period of months, was far too slow a process in these circumstances. To “outlaw the said offenders according to the usual forms and procedures of the courts of law would leave the said good people for a long time exposed to murder and devastation.”⁶⁶ Instead, the bill set out a suspensive attainder, giving Philips and his gang until an unspecified day in June to surrender. If Philips failed to surrender by the end of

61. See COLLINS, *supra* note 2, at 19, 21 (2016) (discussing notoriety and “notorious”); see also T.F.T. Plucknett, *The Origins of Impeachment*, 24 TRANSACTIONS ROYAL HIST. SOC’Y 47, 59–61, 63–67, (1941); Steilen, *supra* note 2, at 889–90 (discussing American bills of attainder and related summer procedures that used the word, specifically, identifying New York and Pennsylvania measures); Kenneth Pennington, *Two Essays on Court Procedure: The Jurisprudence of Procedure* 185, 205–06 (unpublished manuscript) (on file with author).

62. See 1 FREDERICK, *supra* note 29, at 279–80 (discussing outlawry).

63. See, e.g., BELLAMY, *supra* note 59, at 184–88.

64. Steilen, *supra* note 2, at 885–86; see also CHAPIN, *supra* note 25, at 55, 78–80; LEVY, *supra* note 9, at 71–72; VAN TYNE, *supra* note 25, at 190–242, 268–85; James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 147, 157–59 (1909).

65. *Bill to Attaint*, *supra* note 1, at 189–90.

66. *Id.* at 190.

the grace period, he could be killed on sight, effectively deputizing the state's citizens and thereby extending its executive force.⁶⁷ If, on the other hand, Philips surrendered before the grace period expired, he could claim a common-law trial. Crucially, since the act charged Philips with having “levied war,” a kind of treason, that trial would presumably be on charges of treason. Philips was not the only target. Like other such attainders, Jefferson's bill was general in scope, attainting Philips by name but including, as well, his unnamed “associates and confederates.”⁶⁸ Alleged gang members would be permitted to contest their affiliation and obtain a trial on this issue “according to the forms of law.”⁶⁹

The bill passed swiftly through the assembly. After an initial reading in the House of Delegates on May 28, it was read a second time on May 29 and a third time on May 30; Jefferson was immediately ordered to carry the bill into the Senate, which reported its concurrence later that day.⁷⁰ Representatives made only minor changes to Jefferson's draft, and gave Philips until the last day in June to surrender.⁷¹ “An act to attaint Josiah Philips and others” was reported the following week in the *Virginia Gazette*.⁷²

The research of Jesse Turner in 1914 revealed that Philips was in fact captured before the end of the grace period on the last day of June.⁷³ Excerpts from court records show that Philips was indicted by

67. The other central function of the bill of attainder—obtaining a right to the attainted person's property—was likely of little importance in Philips's case. Cf. Steilen, *supra* note 2, at 775 (describing six functions served by English bills of attainder).

68. *Bill to Attaint*, *supra* note 1, at 190; see also An Act for preventing tumultuous and riotous Assemblies in the Places therein mentioned, and for the more speedy and effectual punishing the Rioters, 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 647 (James B. Lyon ed., 1894) (providing another example of a general act of attainder).

69. *Bill to Attaint*, *supra* note 1, at 190.

70. JOURNAL OF THE HOUSE OF DELEGATES OF VA., *supra* note 57, at 28, 32, 35 (1778); Trent, *supra* note 9, at 446–47, 447 n.2 (correcting Wirt on the basis of the House Journal).

71. An act to attaint Josiah Philips and others, unless they render themselves to justice within a certain time, VA STATUTES AT LARGE, *supra* note 1. *Contra* Bill to Attaint, *supra* note 1, at 193 nn.1–10.

72. THE VIRGINIA GAZETTE (Purdie) (June 5, 1778), p. 2, col. 2. Like other acts, acts of attainder were regularly published in colonial and state newspapers. This entry does not describe the content of the act attainting Philips, including the thirty-day grace period.

73. Turner, *supra* note 3, at 338–39. The document Turner discovered describes an examination of Philips by a judge on charges that he had committed a robbery, after which Philips is committed to jail. The date of the proceeding is June 11, 1778. *Id.* at 339; see also VIRGINIA GAZETTE (Purdie) (June 19, 1778), p. 2, col. 2 (“Last Tuesday the noted Josiah Philips and James Hodges were safely lodged in the publick jail by the sheriff of Princess Anne. They were taken the 4th instant, at night, in Norfolk County.”). Prior to Turner, the view had been that Philips was captured in the late summer or autumn of 1778, after the grace period had

a grand jury on October 20, 1778—not for treason, however, but for robbery “of twenty-eight men’s felt hats . . . and five pounds of twine.”⁷⁴ Edmund Randolph, who had been clerk of the House of Delegates when Philips was attainted, was then the state’s Attorney General, and apparently initiated this prosecution. Tried by jury and found guilty, Philips was sentenced to death and executed in December 1778.⁷⁵

II. JOSIAH PHILIPS *REDUX*

One of the great challenges of the Philips attainder is; that the record freely admixes history and memory. Much of what we know about the case derives from later accounts given by Randolph, Henry, Tucker, and Jefferson, which rest, ostensibly, on personal recollection. Together, these statements raise a number of difficult questions; Edmund Randolph’s account, in particular, seems at odds with the institutional records that have been preserved. There is no easy way to deal with these difficulties. My approach below is to excerpt the relevant statements and then consider what they might mean in context. Proceeding in this fashion gives us three groups: (A) statements by Randolph and Patrick Henry in the Virginia ratification convention of 1788; (B) an account given by St. George Tucker in annotations to his edition of Blackstone’s *Commentaries*, published in 1803 but likely written in the early 1790s; and (C) a series of letters written by Thomas Jefferson between 1814 and 1816.

It is admittedly a bit tedious to try and sort all this out, but reexamining what Randolph, Henry, Tucker and Jefferson said about the Philips case does prove to have several benefits. First, it shows that Randolph’s account, while erroneous in several minor respects, can be

expired. This view was based on statements made by Jefferson and entries in the Privy Council journal authorizing rewards for the capture. *Girardin Letter*, *supra* note 8, at 337; Trent, *supra* note 9, at 448; *see generally* WIRT, *supra* note 41, at 216–25.

74. *An Indictment Against Josiah Philips For Robbery (Oct. 20, 1778)*, in WIRT, *supra* note 41, at xi (noting that “true bill” was written on the indictment in Edmund Randolph’s handwriting); *see also* VIRGINIA GAZETTE (Purdie) (Oct. 30, 1778), p. 3, col. 2 (reporting a “trial [of Josiah Philips and others] . . . for robbing the publick waggons”). The original court records were reportedly destroyed during the Civil War. Trent, *supra* note 9, at 448. Wirt told Jefferson sometime in 1815 or 1816 that he had discovered the records. *Letter from Thomas Jefferson to William Wirt (Oct. 8, 1816)*, in 10 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 438 (J. Jefferson Looney ed., 2013) [hereinafter *Writ Letter, 1816*].

75. WIRT, *supra* note 41, at xi–xii (reproducing Philips’s verdict, judgment, sentence, and a report of his execution); *see also* VIRGINIA GAZETTE (Dixon & Hunter) (Dec. 4, 1778), p. 2., col. 2 (“This day were executed at the gallows near this city, pursuant to their sentence, the following criminals, viz. Josiah Philips . . .”).

interpreted in a way that renders it largely accurate. There are errors in Randolph's retelling, to be sure, but they are best described as errors of emphasis, as the colorization one adds to a story to enhance its rhetorical effect. There is a second benefit as well. A close reading of the record suggests that we have missed the *point* of Randolph's argument almost entirely. The perception that Randolph's account was grossly erroneous arises, I think, from a failure to think about the institution of the wartime representative assembly as did Randolph and his principal interlocutor, Henry. For them the assembly was the central repository of sovereignty in a republic and had critical legal functions in wartime, including the use of summary legal procedures like the bill of attainder. In exercising these functions the assembly was not limited to passing general, forward-looking laws—a constraint that would be ill-fitted to the nature of the task. If we try to imagine as they would have the different institutional forms sovereignty could assume in the prosecution of a civil war and the protection of a state's citizens, we can better understand what was at stake in arguments where the Philips case was adduced: the scope of summary proceedings and the integrity of ordinary forms of justice.

A. Randolph and Henry in the Virginia Ratifying Convention

Philips' case made its first reappearance ten years after his execution, in the convention of Virginia delegates elected to ratify the proposed federal Constitution.⁷⁶ On June 6, 1788, the fourth day of the convention, Governor Edmund Randolph—who had previously been clerk of the House of Delegates when Philips was attainted, and then Attorney General when Philips was indicted and convicted of robbery—adduced the attainder as an example of the insecurity of individual rights.⁷⁷ The Virginia Constitution of 1776 did not prohibit attainders, but section 8 of its Declaration of Rights did guarantee that defendants could confront their accusers, compel the production of favorable evidence, and have a jury trial. Randolph then described what had occurred for the benefit of the convention:

A man who was a citizen was deprived of his life, thus—from a mere reliance on general reports, a Gentleman in the House of Delegates informed the House, that a certain man (Josiah Philips) had committed several crimes, and was running at large perpetrating other crimes, he therefore moved for leave to attaint him; he ob-

76. See generally VIRGINIA GAZETTE (Dixon & Hunter) (Dec. 4, 1778), p. 2., col. 2.

77. *Id.*

tained that leave instantly; no sooner did he obtain it, than he drew from his pocket a bill ready written for that effect; it was read three times in one day, and carried to the Senate: I will not say that it passed the same day through the Senate: But he was attainted very speedily and precipitately, without any proof better than vague reports! Without being confronted with his accuser and witness; without the privilege of calling for evidence in his behalf, he was sentenced to death, and was afterwards actually executed.⁷⁸

The account looks startlingly inaccurate. As we know, Philips' attainder did not pass through the House of Delegates in one day. Nor was Philips deprived of his confrontation or jury trial rights; he was indicted for robbery, tried by a jury and convicted. The errors are hard to understand, given Randolph's positions as clerk of the House and Attorney General; surely, no one was in a better position than Randolph to know what *had* happened.

Yet perhaps even more surprising was the response Randolph's description drew from Patrick Henry one day later. Rather than challenge Randolph, Henry largely conceded the account. Philips, he argued,

was not executed by a tyrannical stroke of power <nor was he a Socrates>. He was a fugitive murderer and an out-law. . . . Those who declare war against the human race, may be struck out of existence as soon as they are apprehended. He was not executed according to those beautiful legal ceremonies which are pointed out by the laws, in criminal cases. The enormity of his crimes did not entitle him to it. I am truly a friend to legal forms and methods; but, Sir, the occasion warranted the measure. A pirate, an out-law, or a

78. 9 DHRC, *supra* note 57, at 972. Randolph's speech, as well as the speech of Henry on the following day, are taken from DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 77–78 (1788) [hereinafter DEBATES OF THE CONVENTION OF VIRGINIA], the first of three volumes compiled from shorthand notes taken by lawyer David Robertson and published in October 1788, several months after the convention concluded. 9 DHRC, *supra* note 57, at 902. Robertson sat in the galley, *id.*, a seat he described as “remote from the speakers, where he was frequently interrupted by the noise made by those who were constantly going out and coming in.” *Id.* at 905. Robertson could understand certain speakers better than others. Asked years later to describe the accuracy of Robertson's record, John Marshall commented that “Gov: Randolph whose elocution was good was pretty well reported,” but that “Mr. Henry was reported worst of all,—no reporter could Correctly reporte him.” *Id.* at 905. George Mason was less sanguine, but for a different reason, accusing Robertson on multiple occasions of bias as a “federal Partizan.” *Id.* at 904. On Robertson's reporting, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 258–59 (2010) (suggesting that hearing, rather than bias, was Robertson's principal problem); MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 167 (2015) (“The printed speeches [of the Virginia Convention] differed from members' recollections. . . . [They] remained a product of partial memory and generous extrapolation.”).

common enemy to all mankind, may be put to death at any time. It is justified by the laws of nature and nations.⁷⁹

But Philips had not been “struck out of existence” upon being apprehended! He had been given a trial. Henry’s offhand remark that Philips was not “a Socrates” became a Federalist talking point in the first half of the convention. Randolph brought it up on June 9, John Marshall mentioned it on June 10, George Nicholas discussed it that day and then again on June 14 and 16, and Edmund Pendleton, president of the convention, discussed the matter on June 12.⁸⁰ Only Benjamin Harrison came to Henry’s defense, cautioning that Philips “was a man, who, by the law of nations, was entitled to no privilege of trial.”⁸¹

Jefferson made no comment, as he was then in France.

B. St. George Tucker in Blackstone’s Commentaries

The Philips attainder slept again. Fifteen years later, in 1803, leading Virginia judge St. George Tucker published an annotated version of Blackstone’s *Commentaries on the Law of England*, which included a clause-by-clause commentary on the federal Constitution. Tucker had likely written the notes in the early 1790s for a course on law he gave at William and Mary.⁸² When Tucker came to the prohibition of bills of attainder in article I, sections 9 and 10, he described them in no uncertain terms. “Bills of attainder,” Tucker wrote, were “state-engines of oppression in the last resort, . . . supply[ing] the want of legal forms, legal evidence, and of every other barrier which the laws provide against tyranny and injustice in ordinary cases.”⁸³ They were evident “in almost every page of English history for a considerable period.” Tucker then turned to the Philips case:

In May, 1778, an act passed in Virginia, to attaint one Josiah Philips, unless he should render himself to justice, within a limited time: he was taken, after the time had expired, and was brought before the

79. 9 DHRC, *supra* note 57, at 1038. DHRC incorporates corrections made by reporter Robertson in an 1805 edition of the Debates, which are set off by angle brackets. The 1788 edition of the Debates omits mention of Socrates from Henry’s speech, but includes a footnote in Randolph’s speech of June 9, which reads, “Mr. Henry had said that Philips was not a Socrates.” DEBATES OF THE CONVENTION OF VIRGINIA, *supra* note 78, at 192.

80. 9 DHRC, *supra* note 57, at 1086, 1116, 1127, 1333; 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1197 (John P. Kaminski & Gaspare J. Saladino et al. eds., 1993).

81. 9 DHRC, *supra* note 57, at 1127.

82. TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 6, at viii.

83. *Id.* at 292–93.

general court to receive sentence of execution pursuant to the directions of the act. But the court refused to pass the sentence, and he was put upon his trial, according to the ordinary course of law This is a decisive proof of the importance of the separation of powers of government, and of the independence of the judiciary⁸⁴

But how could it be? Philips had, in fact, come in before the end of the grace period. He therefore could not have been executed under the act of attainder. Tucker knew several of the judges involved and may have discussed the matter with them.⁸⁵ From where, then, could Tucker have gotten the impression that the General Court refused to enforce the act?

C. The Jefferson-Wirt and Jefferson-Girardin Exchanges

Ten years later, in 1814, Jefferson finally learned of the afterlife of the attainder of Josiah Philips. In July, William Wirt wrote Jefferson seeking information for a biography of Patrick Henry. Wirt noted that Henry had been “much censured by Mr Ed. Randolph” at the 1788 convention “on account of the attainder of a man by the name of Philips.”⁸⁶ Could Jefferson provide any information? Jefferson responded the next month. Randolph’s censure of Henry was, he wrote, “without foundation.”⁸⁷ As Jefferson recalled it, Henry had informed him of Philips’s doings, and both men thought it best to proceed by bill of attainder. When Philips was captured, it was *Randolph* who decided not to have him executed according to the Act. Randolph believed Philips “would plead that he was a British subject, taken in arms, in support of his lawful sovereign, and as a prisoner of war entitled to the protection of the law of nations.”⁸⁸ It was “safest” simply to indict him for robbery.

The next spring, in March 1815, Jefferson wrote a much fuller account of the affair to Louis Girardin, who was then at work continuing a classic history of Virginia.⁸⁹ Girardin’s manuscript referred to

84. *Id.* at 293.

85. Trent, *supra* note 9, at 452 (“The learned judge has long been known . . . as a painstaking writer. Would he have permitted himself to make so important a statement without having investigated the subject carefully?”).

86. *Letter from William Wirt to Thomas Jefferson (July 27, 1814)*, in 7 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 495 (J. Jefferson Looney ed., Princeton Univ. Press 2010); see also Trent, *supra* note 9, at 451.

87. *Writ Letter, 1814*, *supra* note 46, at 548.

88. *Id.* at 549.

89. JOHN BURK, 4 SKELTON JONES & LOUIS HUE GIRARDIN, THE HISTORY OF VIRGINIA: FROM IT’S FIRST SETTLEMENT TO ITS PRESENT DAY 305–06 (1816).

St. George Tucker's account of the Philips attainder in his now-influential edition of the *Commentaries*. Jefferson was critical. "[I]nstead of a definition of the functions of bills of attainder," wrote Jefferson, Judge Tucker had "given a diatribe against their abuse." But bills of attainder had "a proper office," which was to reach fugitives from justice. "[W]hen a person, charged with a crime, withdraws from justice, or resists it by force, either in his own or a foreign country, . . . a special act is passed by the legislature, adapted to the particular case."⁹⁰ Properly formed, such an act should provide the defendant a chance to appear, but "declare[] that his refusal to appear shall be taken as a confession of guilt, . . . and pronounce[] the sentence which would have been rendered on his confession or conviction in a court of law." The attainder of Philips had taken just this form. He had been "too powerful to be arrested by the sheriff and his posse comitatus." Proofs of his wrongdoing "were ample, his outrages as notorious as those of the public enemy, and well known to the members of both houses from those counties." Philips' alleged service in the English cause did not make it unlawful for Virginia to proceed by bill of attainder, since "an enemy in lawful war putting to death, in cold blood, the prisoner he has taken, authorizes retaliation, which would be inflicted with peculiar justice on the individual guilty of the deed." Randolph had proceeded against him "as a murder & robber" anyway, against which Philips "pleaded that he was a British subject, authorized to bear arms by a Commission from L^d Dunmore, that he was a mere prisoner of war," but the plea had been rejected and Philips executed "according to the forms and rules of the Common law." Judge Tucker was wrong that the judges had refused to enforce the Act. Its enforcement was in fact "never proposed to them."⁹¹

D. Making Sense of Randolph's Account

The record raises two central questions. *First*, why did Randolph misrepresent the proceedings against Josiah Philips?⁹² Or did he,

90. See *Girardin Letter*, *supra* note 8, at 334.

91. *Id.* at 334, 336–37. An examination of the records in the case, suggested Jefferson, would be appropriate, as he was "not so certain in my recollection of the details." *Id.* at 337; see also *Letter from Thomas Jefferson to William Wirt* (Aug. 5, 1815), in 8 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 643–44 (J. Jefferson Looney ed., 2011).

92. Although Crosskey and Eckenrode thought Randolph lied, CROSSKEY, *supra* note 9, at 946; ECKENRODE, *supra* note 9, at 193, Jefferson did not. *Writ Letter*, 1816, *supra* note 74, at 438 ("[N]ot that I consider mr Randolph as misstating intentionally, or desiring to bolster an argument at the expence of an absent person . . . and as little do I impute to mr Henry any willingness to leave on my shoulders a charge which he could so easily have disproved."). On another occa-

somehow, forget? But what, then, of Henry's response—did Henry forget too? *Second*, why did Tucker claim that the judges of the Virginia General Court had refused to enforce the act of attainder? Whether one took Randolph's view—that Philips had been "afterwards actually executed"—or Jefferson's view (and the view of modern researchers)—that Philips had been tried by a jury and executed for robbery—there was no basis for thinking the case had involved judicial review.

Return, first, to Edmund Randolph's account of the Philips attainder at the Virginia ratifying convention. A clue to what Randolph intended can be found in his *History of Virginia*, composed between 1809 and 1813 and for many years available only in manuscript.⁹³ Randolph's *History* refers briefly to the Philips affair, reiterating much of what he had alleged at the convention, but with an important addition. Here is what Randolph says:

It was generally believed that a banditti in the neighborhood of Norfolk had availed themselves of the cover and aid which a British squadron and British forces had lately afforded them for plunder and revenge by various atrocities on many citizens. One Josiah Philips . . . had eluded every attempt to capture him. . . . [T]he General Assembly, without other evidence than general rumor of his guilt, or the insufficiency of legal process in taking him into custody, on the motion of a member attainted him of high treason, unless he should surrender by a given day. In a very august Assembly of Virginia, it was contended that, as he deserved to die, it was unimportant whether he fell according to the technicality of legal proceeding or not. Probably he deserved death, although if a judgment can be formed of this by subsequent facts, *the prosecution against him being as against a robber, not a traitor, he was an offender less heinous than he was conceived to be*. His apology, too, was not perhaps admissible, although it was that he had never for a moment acquiesced in the Revolution . . . and that his loyalty was not for a moment concealed, but he received on the first opportunity, and acted under, a military commission from the crown. He did not surrender within

sion, Jefferson described Randolph as "the poorestameleon I ever saw, having no colour of his own, and reflecting that nearest to him." EDMUND RANDOLPH, *HISTORY OF VIRGINIA*, at xv (Arthur H. Shaffer ed., 1970) (1809–1813) [hereinafter RANDOLPH, *HISTORY*] (quoting Dice Robins Anderson, *Edmund Randolph*, in 2 *THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY* 100 (1927)).

93. RANDOLPH, *HISTORY*, *supra* note 92, at xxxvii–xliv. The Shaffer edition is the only printed version of the *History* of which I am aware, although parts of it were reproduced in various places by individuals who had seen the manuscript. *E.g.*, 1 WILLIAM WIRT HENRY, *PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES* 435 (1891).

the time prescribed and was exposed, on being arrested, to the single question whether he was the person attainted and upon the establishment of the affirmative to be led to execution. He waived his apology because he would not exasperate his jury in his defense against robbery.⁹⁴

Randolph's account in the *History* clearly demonstrates that he was aware Philips was prosecuted for robbery. Randolph regards this fact as consistent with his criticism of the attainder—in fact, Philips's prosecution for *robbery* is part of what bothers Randolph most about the affair. This suggests a different interpretation of Randolph's words at the Virginia ratifying convention in 1788. On that occasion, Randolph noted that the House of Delegates had relied on only "vague reports" or "general reports," and that these reports had alleged Philips merely to have committed "several crimes."⁹⁵ Randolph also emphasized the speed with which the bill passed through House, which had deprived Philips of an opportunity to appear and defend himself before the bill passed.⁹⁶ These points suggest that Randolph's concern was with *the circumstances under which the bill passed*, rather than the act's subsequent execution. Indeed, Jefferson himself suggests just this interpretation of Randolph's words in his letter to Louis Girardin. If, wrote Jefferson, "mr Randolph meant only that Philips had not these advantages [i.e., confrontation of his accusers and the introduction of evidence] *on the passage of the bill of Attainder*, how idle to charge the legislature with omitting to confront the culprit with his witnesses, when . . . their sentence was to take effect only on his own refusal to come in and be confronted."⁹⁷ Moreover, Randolph did not, in fact, deny that Philips had been tried. He stated only that the bill had sentenced Philips to death (as it had, *conditionally*), and that Philips was "afterwards actually executed."⁹⁸ Both propositions were true, so far as we know.

Nor did Randolph falsely *imply* that Philips had been executed pursuant to the act of attainder. It would have been reckless to attempt such a thing given the convention's membership. Present there were a number of judges and former judges who had served during the Philips affair, including John Blair, Paul Carrington, and the doyens of Virginia legal society, George Wythe and Edmund Pendleton,

94. RANDOLPH, *HISTORY*, *supra* note 92, at 268–69 (emphasis added).

95. 9 DHRC, *supra* note 57, at 972.

96. *Id.*

97. *Girardin Letter*, *supra* note 8, at 335 (emphasis added).

98. 9 DHRC, *supra* note 57, at 972.

any one of whom might have known of Philips' fate.⁹⁹ Their politics and purposes were diverse. Another judge, Joseph Jones, had served on the General Court in 1778 and would now vote against the proposed federal Constitution, in opposition to Randolph. James Madison knew of the Philips case from his seat on the governor's Privy Council in 1778 and supported the Constitution, but opposed Randolph's desire to *amend* it.¹⁰⁰ Patrick Henry and Benjamin Harrison opposed the Constitution *unless* amended (Henry, likely, even if amended), and both had been personally involved in Philips's attainder. Whether moved by politics or office, any one of these men might have undermined Randolph by pointing out a misleading implication. His credibility already in question for having switched positions on the Constitution (he had refused to sign it at the Philadelphia Convention), it would have been utterly senseless for Randolph to risk his reputation—and ratification—to mischaracterize the case.¹⁰¹

Assuming they were accurately reported, Henry's remarks did evince a mistaken belief that Philips had been executed pursuant to the act of attainder. Were this the point in dispute, all those present with knowledge of Philips's case would have expected Randolph to correct the error, and Randolph would have been aware of such an expectation. But it was not the point in dispute. Randolph's purpose in referring to the Philips case was, as he put it, to demonstrate the insecurity of "public justice" in Virginia, and for that purpose the bill's passage was the crucial point.¹⁰² Randolph dwelled on the circumstances under which the bill passed. He emphasized speed, collusion, and that Philips had not been afforded an opportunity to appear and defend himself.¹⁰³ The last point was attractive because it was a clas-

99. Compare 10 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 80, at 1540–41 (listing Virginia ratification 'aye' and 'no' votes), with 2 WILLIAM BROCKENBROUGH, VIRGINIA CASES, OR DECISIONS OF THE GENERAL COURT OF VIRGINIA, at x, xiii (1826) (listing members of General Court and High Court of Chancery).

100. Prior to the convention, Madison suspected that Randolph approved of the Constitution, if amended before ratification; at the convention, however, Randolph urged that amendment should follow ratification. MAIER, *supra* note 78, at 232, 241, 261.

101. See *id.* at 261 (noting that "members of the opposition were not so happy about Randolph's stand [in favor of ratification prior to amendment], and periodically in the course of the convention they would make comments about Randolph's inconsistency that provoked brief, emotional flare-ups"); see also RANDOLPH, HISTORY, *supra* note 92, at xiii (similar).

102. See 9 DHRC, *supra* note 57, at 971 ("Governor Randolph.— . . . The security of public justice, Sir, is what I most fervently wish—as I consider that object to be the primary step to the attainment of public happiness. . . . We are told that the report of dangers is false. The cry of peace, Sir, is false: Say peace when there is peace: It is but a sudden calm. The tempest growls over you—look round—wheresoever you look, you see danger.").

103. *Id.*

sic objection against bills of attainder, which others were likely to know.¹⁰⁴ The objection was not usually employed against *suspensive* attainders, however, and Jefferson's response, quoted above, shows why: surely one cannot fault the assembly for proceeding against Philips *in absentia* when the man refused to come in. Yet Randolph had a rejoinder to Jefferson, which he described in the *History*: Should a citizen have to bear the risk that he be conditionally sentenced to death by the legislature without notice? "What was [Philips's] peril, while he was roving abroad, devoted by a legislature to death unless he should surrender himself"?¹⁰⁵ And what could Philips have expected had he come in, given that the "denunciation of a government is almost the sure harbinger of condemnation"?¹⁰⁶ A jury would be biased against a defendant already publicly condemned in the legislature by the leading men of the state. The rejoinder was especially powerful because Philips had been alleged merely to have committed "several crimes"—murder, arson and robbery—rather than conduct that was *unequivocally* treason. Indeed, report of Philips's trial in the *Virginia Gazette* stated a charge of "robbing the publick waggons"—but then added, parenthetically, that his gang "were accused of murder, treason, and sundry other outrages."¹⁰⁷ If serious but ordinary crimes were to be summarily prosecuted in the assembly any time judicial process failed, it risked "confounding" legislative and judicial powers and thereby corrupting ordinary forms of justice. *That* danger was not alleviated because Philips had in fact received a trial.¹⁰⁸

This construction of Randolph's comments provides a key for making sense of much of what was said about Philips at the conven-

104. See, e.g., Steilen, *supra* note 2, at 800–02 (noting the criticism of Elizabeth Barton attainer); *id.* at 822–23 (discussing the attainer in Coke's *Institutes* and "On the Judicature of Parliaments").

105. RANDOLPH, *HISTORY*, *supra* note 92, at 269.

106. *Id.* Levy makes this point in his discussion of the case, without attributing it to Randolph. LEVY, *supra* note 9, at 76.

107. VIRGINIA GAZETTE (Purdie) (Oct. 30, 1778), p. 3, col. 2 ("On Friday the 16th commenced, and continued to the 21st, the trial of sundry prisoners from the publick jail, when Josiah Philips [and others] from Princess Anne for robbing the publick wagons (and who were accused of murder, treason and sundry other outrages) were capitally convicted . . .").

108. According to Madison's notes and the official journal of the Philadelphia convention, on August 20, 1787, Randolph had moved to broaden the definition of treason in the draft Constitution to include giving aid and comfort to the enemies of the United States, because they "had a more extensive meaning." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 339, 345–46, 351 (Max Farrand ed., 1937); see also 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 569 (1900). The act of attainder, however, charged Philips and his gang with having levied war, and thus depended on a theory that the use of armed force to resist the execution of law or effect change was treasonous. See *supra* note 55.

tion. For if Randolph aimed his attack at the scope of legislative attainder, then Henry would focus his defense there as well. Henry had defended bills of attainder before, as Randolph knew. During deliberations in the 1776 convention that enacted Virginia's *state* constitution, Henry had argued forcefully against language in a draft declaration of rights prohibiting bills of attainder, citing cases not unlike Philips'. According to Randolph's *History*, "An article prohibiting bills of attainder was defeated by Henry, who with a terrifying picture of some towering public offender against whom ordinary laws would be impotent, saved that dread power from being expressly proscribed."¹⁰⁹ The guarantee of jury trials and confrontation in (what became) section 8 of the Declaration of Rights was objected to on a similar basis.¹¹⁰ Henry's ally, the radical Thomas Ludwell Lee, also attempted to qualify a ban on ex post facto laws for this reason, proffering that such rules "were not natural laws, but might be changed by posterity as the law of necessity—the exigencies of life—might dictate," such as "when the safety of the State absolutely requires" that it act ex post facto.¹¹¹

At the federal convention, twelve years later, Henry found it much harder to stake out this position on bills of attainder. Although George Mason had attacked the proposed Constitution for its ban on ex post facto laws despite the need for such laws to protect "public safety," Henry said nothing about the neighboring provision banning bills of attainder.¹¹² And although slavery played an important role in Henry's arguments during the convention, he made no effort to connect the Philips attainder to the presence of escaped slaves in the gang

109. RANDOLPH, *HISTORY*, *supra* note 92, at 255; *see also* Hilldrup, *supra* note 52, at 202–03.

110. Hilldrup, *supra* note 52, at 193 (reporting that Thomas Ludwell Lee or an ally "tried to attach to this section . . . an amendment . . . 'that no man, except in times of actual invasion or insurrection, can be imprisoned upon suspicion of crimes against the States, unsupported by legal evidence,'" which Hilldrup views as giving "martial law a constitutional sanction").

111. *Id.* at 183. In committee, Henry and Lee had lost to the moderate "Tuckahoes," who insisted on such a ban to protect themselves from anti-Tory laws. *Id.* at 184. The ban, however, was rejected by the full convention.

112. *George Mason's Objections to the Constitution of Government formed by the Convention*, in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 45 (John P. Kaminski & Gaspare J. Saladino et al. eds., 1988) ("Both the general Legislature & the State Legislatures are expressly prohibited making ex post facto Laws; tho' there never was or can be a Legislature but must & will make such Laws, when Necessity & the public safety require them . . ."). Henry joined Mason in his criticism of the bans on federal and state ex post facto laws in Article I, sections 9 and 10, but on the basis that they would require federal and state governments to honor deflated paper currencies and debts. *See* 10 *DOCUMENTARY HISTORY OF RATIFICATION*, *supra* note 80, at 1346–47, 1354, 1356–58.

and the dangers of slave insurrection.¹¹³ Instead, Henry opened the convention by arguing that the proposed federal Constitution would deprive Virginians of the liberties they now enjoyed.¹¹⁴ The tactic made the Philips case awkward, since Philips had at least been threatened with a denial of the right to a jury trial. Henry's strategy was to argue that Philips was never entitled to the procedure; the legislature could proceed as it did, Henry argued, because Philips was a "fugitive" and an "out-law," a "common enemy to all mankind." As the speech unwound, however, Henry lost his grip on the argument, as listeners misunderstood the observation about Socrates, whom Henry adduced not as an example of a virtuous man, but as someone *unjustly* condemned and executed (ironically, by a jury). Philips, in contrast, had been given a fugitive's due. Delegates missed the point, and when Henry concluded that Philips' treatment was justified by the "laws of nature and nations," they heard confirmation of a view that the *unvirtuous* might be deprived of trial by jury.¹¹⁵ Federalists sensed a misstep and seized upon it.

So, why, then, did Randolph misrepresent what had happened to Philips? The answer is that he did not—at least, not where it counted. Randolph *was* guilty of exaggerating the speed with which the bill passed through the house. He was also mistaken that Philips had been captured *after* the grace period in the act expired. And he was less than fully forthright in failing to correct Henry's assertion that Philips had not enjoyed a jury trial, although he probably remained well within the conventions and mutual expectations that characterized

113. See Robin L. Einhorn, *Patrick Henry's Case Against the Constitution: The Structural Problem with Slavery*, 22 J. EARLY REPUB. 549, 549–55 (2002) (discussing Henry's speech of June 24). Randolph broached the issue of slave insurrections early in the convention. MAIER, *supra* note 78, at 274.

114. See 9 DHRC, *supra* note 57, at 930 ("[Patrick Henry:] I expected to have heard the reasons of an event [*i.e.*, the proposal of the Constitution] so unexpected to my mind, and many others. Was our civil polity, or public justice, endangered or sapped? . . . This proposal of altering our Federal Government is of a most alarming nature . . . you ought to be extremely cautious, watchful, jealous of your liberty; for instead of securing your rights, you may lose them forever."). When Randolph and Pendleton responded that Virginia was suffering from economic depression, Henry chided them, "You are not to inquire how your trade may be increased, nor how you are to become a great and powerful people, but *how your liberties can be secured*." *Id.* at 951–52 (emphasis added). For Randolph and Pendleton's comments, see *id.* at 934, 944. According to Pauline Maier, Henry's argument that "[t]he people were secure before the Constitutional Convention met" "effectively redefined the questions for debate," and "forced [the convention] to confront big questions that were not on its formal agenda." MAIER, *supra* note 78, at 260, 257.

115. See 9 DHRC, *supra* note 57, at 1038.

convention discourse.¹¹⁶ For Philips' trial was not Randolph's concern. Randolph's concern was that a bill of attainder had passed merely on the basis of reports that Philips led a gang engaged in murder, arson and robbery, without offering Philips an opportunity to appear and defend himself. *This* was true, and it supported Randolph's contention that civil justice was insecure in Virginia. If the assembly could interfere in judicial forms of process merely because it was wartime, then section 8 of the state's admirable Declaration of Rights would not be enough to protect Virginians' liberties. And it was at this proposition, naturally, that Patrick Henry aimed his response. The Philips case did not evidence a failure of justice, Henry argued, since everyone had known that Philips was not entitled to the protections of the common law. Swept up by his own argument, perhaps, Henry mishandled the point—a result that apparently was not uncommon for the great orator.¹¹⁷

If I am right about this, it follows that Henry, Jefferson and even Randolph regarded the General Assembly as possessing significant legal powers. Their dispute was about the scope of these powers. This reinforces a reading of section 5 of the Virginia Declaration of Rights, which famously provided for a separation of powers, as intended merely to secure some autonomy for Virginia courts, rather than confine the assembly to a legislative 'function'—passing general, forward-looking laws.¹¹⁸ Indeed, from one perspective, it was essential that a republican assembly have the authority to cure failures in justice caused by a breakdown in judicial process. In appropriate cases, where the security of the whole people was at risk, the assembly might

116. Cf. Jack Rakove, *A Biography of Madison's Notes of Debates*, 31 CONST. COMMENT. (forthcoming) (reviewing BILDER, *supra* note 78) (identifying, among "the rhetorical conventions that operated during the ratification conventions," the conversion of "'the complicated political process into the thoughts of a single mind'").

117. *Girardin Letter*, *supra* note 8, at 335 ("[Henry] must have known that Philips was tried and executed under the Common Law, and yet, according to this report, he rests his defence on a justification of attainder only. [B]ut all who knew mr Henry know that when at ease in argument, he was sometimes careless, not giving himself the trouble of ransacking either his memory or imagination for all the topics of his subject, or his audience that of hearing them."). We should not conclude, I think, that Randolph knowingly took advantage of Henry in this regard, given the membership of the convention and the risk of having a misleading statement be openly corrected.

118. *Declaration of Rights*, *supra* note 20, at 1920 ("Sect. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary"); see also ADAMS, *supra* note 20, at 265 ("Virginia's constitution of June 1776 was the first constitutional document since the *Instrument of Government* . . . to include the principle of separation of powers in express terms. It did so with a clarity that no previous statement of either theory or practice had achieved.") (providing representative readings of this section); GERBER, *supra* note 20, at 61.

suspend the law in favor of summary or military proceedings, guided by the expertise of elite lawyers sitting there.¹¹⁹ This was one way in which the representative assembly, and not the governor, inherited the king's obligations to protect his subjects and provide justice.¹²⁰ In Jefferson's mind, at least, such an allocation was preferable to vesting the authority in common-law courts, since judicial innovation was inconsistent with republican government, even where judges improvised on a long-established judicial writ like outlawry.¹²¹

III. ST. GEORGE TUCKER AND THE ROLE OF COURTS IN WARTIME GOVERNANCE

Jefferson saw an expansive role for the General Assembly in Virginia's republican government, but even he would later admit that it did not prove equal to the task. It was prone to the same corruption that had compromised Virginia's colonial government.¹²² The state's constitution was of no avail in this regard; as Jefferson complained in *Notes on the State of Virginia*, it was "no alleviation" to the threat of despotism that powers had been placed "in a plurality of hands," as guaranteed by section 5 of the Declaration of Rights, since the Assembly had absorbed "[a]ll the powers of government, legislative, executive and judiciary," inserting itself even into the ordinary course of justice.¹²³ Over the course of the 1780s, then, some Virginians began to envision a shift in the institutional forms of magistracy. The General Assembly would have to be bound by "well-designed legal mechanisms."¹²⁴ One such mechanism was a stronger *national* authority;

119. Section 7 of the *Declaration of Rights* requires the consent of the "representatives of the people" to suspend laws. *Declaration of Rights*, *supra* note 20, at 1920. Jefferson clearly thought the assembly should have a power to attain. In addition to his Bill to Attain Josiah Philips, see Jefferson's proposed "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," probably written in late 1778, which provides that "No attainer shall work corruption of blood in any case." *Bill to Attain*, *supra* note 1, at 503, 506–07 n.21.

120. Matthew Crow, *Thomas Jefferson and the Uses of Equity*, 33 *LAW & HIST. REV.* 153, 168–69 (2015).

121. A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810*, at 163–67 (1981); David Thomas König, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication*, in *THE MANY LEGALITIES OF EARLY AMERICA* 114–17 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

122. COLBOURN, *supra* note 58, at 172–73.

123. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 123–24 (1785). That the assembly interfered with the ordinary course of justice is how I understand the famous complaint that the Assembly had "in many instances, decided rights which should have been left to judiciary controversy." *Id.* at 124.

124. Gerald Leonard, *Jefferson's Constitutions*, in *CONSTITUTIONS AND THE CLASSICS: PATTERNS OF CONSTITUTIONAL THOUGHT FROM FORTESCUE TO BENTHAM* 378 (Denis J. Galligan ed., 2014). Compare Leonard's account with Mary Sarah Bilder's account of Jefferson's thinking

but another was the court of law, now inoculated against executive interference by a doctrine of ‘judicial independence,’ and improved by statutory reform and by the spread of common-law procedures.¹²⁵

This is the context in which we must take up St. George Tucker’s suggestion, in his edition of Blackstone’s *Commentaries*, that Virginia’s judges refused to enforce the act of attainder against Josiah Philips. Tucker was a member of the great planter class by marriage, but had found commercial success and reputation largely as a lawyer practicing before Virginia’s central courts in the 1780s.¹²⁶ He became an early and vigorous proponent of employing the state’s courts as a ‘legal mechanism’ for checking the General Assembly. Tucker had taken this position as early as 1782 (around the same time Jefferson was writing *Notes*), in his argument as an amicus in another treason prosecution, known to us as *Commonwealth v. Caton*.¹²⁷ In *Caton*, the question was whether a provision governing pardons in Virginia’s Treason Act was consistent with the pardon clause in the state’s 1776 Constitution; and, if the former was “repugnant” to the latter, whether the Court of Appeals could declare the act void.¹²⁸ Tucker took the second question first and argued straightaway that the court must have such an authority, concomitant to its power “to explain the Laws of the Land as they apply to particular Cases.”¹²⁹ Moreover, this power was the courts’ alone. For if the General Assembly, too, could “explain the Laws judicially, that is to decide in *particular Cases*,” then

in the late 1780s: “Jefferson returned [to the United States in 1789 from France] with views framed by the aspirations and anxieties of the French Revolution instead of firsthand experience with American political changes For Jefferson, danger lay with would-be monarchists rather than state governments. Salvation lay with republican government rather than national or federal government.” BILDER, *supra* note 78, at 203. As I read Jefferson, the danger, and thus salvation, lay with both. See *Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)*, in 15 THE PAPERS OF THOMAS JEFFERSON 396 (Julian P. Boyd ed., 1958) (“It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal and vicious. . . . Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents”), cited in BILDER, *supra* note 78, at 320 n.2.

125. ROEBER, *supra* note 121, at 161, 197; F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA’S PROVINCIAL LEGAL PERSPECTIVE, 1783–1828, at 12–33 (1994).

126. TAYLOR, INTERNAL ENEMY, *supra* note 38, at 32.

127. *Argument in the Case of the Prisoners* (Oct. 31, 1782), in 3 ST. GEORGE TUCKER’S LAW REPORTS AND SELECTED PAPERS, 1782–1825, at 1741–48 (Charles F. Hobson ed., 2013); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 520–29 (1994).

128. Pendleton’s Account of “The Case of the Prisoners” (*Caton v. Commonwealth*), in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734–1803, at 416–17 (David John Mays ed., 1967); *Commonwealth v. Caton*, 4 Call 5 (1782).

129. *Argument in the Case of the Prisoners*, *supra* note 127, at 1742.

“the Judiciary, who are by the Constitution appointed as a counterpoise to it [i.e., the assembly], is entirely annulled.”¹³⁰ Here Tucker seems to have been responding to Edmund Randolph, also appearing in the case as the state’s Attorney General. Randolph had agreed that a law repugnant to the constitution was void, but *not* that a court of law could declare it void. In other words, he had *opposed judicial review*. In correspondence to friends, Randolph suggested that the people themselves might resolve the validity of the Treason Act, and that a different institution—a council of revision—could enforce the constitution in the future.¹³¹

From an early date, then, Tucker saw a constitutional role for courts of law as a check on the republican assembly, and in this regard he was distinguished from Randolph. But how might the General Court have checked the General Assembly in the Philips case? It is perfectly possible, as Dumas Malone suggested years ago, that Edmund Randolph—who, recall, was also Attorney General when Philips was captured—decided to prosecute Philips for robbery *after*

130. *Id.*

131. Edmund Randolph, *Notes on Virginia Laws. Includes Pardons for Traitors.*, LIBRARY OF CONG., <https://www.loc.gov/item/mjm021836> (last visited Jan. 17, 2017) (“That, howsoever adverse the law, which vests this power in the general assembly may be, to the constitution, no court of judicature can pronounce its nullity.”). My interpretation of Randolph’s argument differs markedly from William Treanor’s. I am indebted here in more than the usual degree to Rob Steinfield, who pointed out to me that Treanor conflates two questions Randolph clearly separates in his notes: “1. [whether] the treason law [should] be declared void, so far as it is repugnant to the constitution,” and “2. If it can be declared void, can any court of judicature pronounce its nullity?” Treanor, *supra* note 127, at 511. Treanor treats the first question as equivalent to judicial review, but I don’t think the reading can be sustained. Randolph describes his answer to the first question as “the decision of my own mind” as to when “the right of resistance commences.” *Id.* at 512. The reference here seems to be to popular resistance to unconstitutional laws, that is, enforcement ‘out of doors,’ rather than in a court of law. Moreover, the reporter Daniel Call records Randolph as arguing against judicial review. *Commonwealth v. Caton*, 4 Call 5, 7 (1782) (“The attorney general, in reply, insisted . . . that the court were not authorized to declare it [the Treason Act] void.”). Treanor suggests that Call is in error and that the portion of Randolph’s notes stating an opposition to judicial review describe the state’s ‘official’ position, to which Randolph was personally opposed. Treanor, *supra* note 127, at 511. Yet there is little reason for such gymnastics other than Treanor’s identification of Randolph’s first and second questions, and for that identification I can find little justification in the text itself. Randolph did support judicial review five years later at the Philadelphia Convention, but as a supplement to a council of revision. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 28 (Max Farrand ed., 1937) (Madison and Paterson notes of Randolph’s ‘Virginia’ Plan); DOCUMENTARY HISTORY, *supra* note 108, at 19 (Madison). In the weeks before the argument in *Caton*, Randolph had written to James Madison that there was talk of creating a “council of revision,” comprising in part members of the assembly, in order to “to keep the legislature in future cases within its just limits.” Letter from Edmund Randolph to James Madison (Oct. 26, 1782), Manuscript/Mixed Material, Library of Congress, <https://www.loc.gov/item/mjm012317>.

*consulting with the judges of the General Court.*¹³² Jefferson later denied that the judges had refused to enforce the act, but a consultation would have been ambiguous, and we should not be surprised if Jefferson, writing to Wirt in 1815, was prone to emphasize the executive discretion it implied, while Tucker in the early 1790s saw the stricter logic of judicial duty. Perhaps, then, the judges expressed an objection to the act of attainder in some way, leading Randolph to prosecute Philips for robbery. But why would the judges have objected? How was the act of attainder relevant? If Philips was captured before the expiration of the grace period in the attainder, why should Randolph have sought out their views on it?

The answer to this question has to do with the boundaries between the law of war and the law of treason. Jefferson's bill of attainder charged Philips with having "levied war against this Commonwealth" by committing murder, arson and robbery. It conditionally attainted him of "high treason," of course—but *it also functioned as an indictment*, ordering Philips and his gang to surrender for "their trials for the treasons, murders and other felonies" they had committed.¹³³ High treason, however, could only be committed by an individual who owed allegiance to the sovereign.¹³⁴ At its core, wrote Blackstone in 1769, high treason was a crime that amounts "either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign."¹³⁵ American courts of law could enforce this principle consistent with their place in a republican form of government, ensuring that assem-

132. DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN* 292 (1948); cf. Trent, *supra* note 9, at 453 (similar suggestion, but under the assumption that Philips was captured after the grace period had expired). Much later, when Randolph served as United States Attorney General, he described for French Ambassador Edmond Genet his decision not to prosecute Chief Justice John Jay, as Genet had requested: "I do not hold myself bound, nor do I conceive that I ought, to proceed against any man in opposition to my decided judgment." *Letter from Edmund Randolph to Edmond Genet*, (Dec. 18, 1793), quoted in CASTO, *SUPREME COURT*, *supra* note 210, 137–38.

133. *Bill to Attaint*, *supra* note 1, at 190; c.3, 9 *STATUTES AT LARGE*, *supra* note 1, at 464. The editor of Jefferson's papers, Julian Boyd, identified a grammatical error in Jefferson's draft bill, which orders Philips and his associates to turn themselves in "in order to their trials for the treasons, murders and other felonies." Boyd suggests that Jefferson omitted the word "stand." *Bill to Attaint*, *supra* note 1, at 193 n.6. Yet the same usage appears in the act of attainder, and as Michael Boucai has pointed out to me, the Oxford English Dictionary defines "in order to" as "with a view to the bringing about of (something), for the purpose of (some desired end)." OED ONLINE ("order") (Aug. 2016).

134. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 4–5, 10–11 (1817) (1644); Calvin's Case (K.B. 1608), in 1 *THE SELECTED WRITINGS OF SIR EDWARD COKE: THE REPORTS* 166, 174–227 (Steve Sheppard ed., 2003).

135. 4 TUCKER, *BLACKSTONE'S COMMENTARIES*, *supra* note 6, at 74.

blies respected the law of nations while playing an active role in protecting the operations of government and preserving domestic peace.¹³⁶

A. The Problem of Allegiance

The leaders of American assemblies understood the legal connections between treason and allegiance. When assemblies sought to establish independent state governments in 1776 and 1777, one of the first acts or ordinances they passed was one defining treason and describing who owed the state allegiance.¹³⁷ Virginia addressed treason and allegiance in two separate acts of assembly. The Treason Act (the one litigated in *Caton*) was passed in October 1776, but it was not until May 1777 that the General Assembly addressed the matter of allegiance, obligating “all free born male inhabitants of this state, above the age of sixteen years” to swear an oath of allegiance before a justice of the peace.¹³⁸ The latter act began by reciting that “allegiance and protection are reciprocal,”¹³⁹ which was a standard view, but which concealed a difficult problem in this case, explaining why allegiance was joined to a compulsory oath. The problem was this: if allegiance followed from protection, then someone whom the state had never protected could not owe the state allegiance. This might be thought to describe Josiah Philips; after all, he had been attainted *by act* because he resided in an *ungoverned area* (the “Dismal Swamp”), where the state was unable to execute the law and judicial process did not run. This meant that a court of law trying Philips for treason would have to determine whether he was even capable of the crime. Three years later, in 1781, this very issue came before the Supreme Court of Pennsylvania in *Respublica v. Chapman*.¹⁴⁰ There the defendant challenged his attainder for treason by the state’s Supreme Executive Council on grounds that he had not owed the state allegiance at the time he joined the enemy in December 1776. On that date the state had not yet enacted a constitution or formed a regular govern-

136. See CASTO, *supra* note 26, at 45–46, 126–41, 146, 159–60; GOEBEL, *supra* note 26, at 623–33.

137. One can find the relevant citations in CHAPIN, *supra* note 25, at 36–41.

138. 9 STATUTES AT LARGE, *supra* note 1, at 168 (“An act declaring what shall be Treason.”); *id.* at 281 (“An act to oblige the free male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes.”).

139. *Id.*

140. *Respublica v. Chapman*, 1 U.S. 53 (Pa. 1781); REPORTS OF CASES RULED AND ADJUDGED IN THE COURTS OF PENNSYLVANIA, BEFORE AND SINCE THE REVOLUTION 53 (1790).

ment. Still, wrote Chief Justice Thomas McKean, “there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws,” administered by council and convention, to which allegiance was due.¹⁴¹ The same issue stood at the center of the Philips case, and in this respect his capture before the end of the grace period in the act of attainder was irrelevant.

But the problem was not limited to cases like Chapman’s and Philips’s. The difficulties posed by allegiance were, in fact, widespread. Prosecution for lesser state crimes, such as the myriad “treasonous misdemeanors” concocted by state legislatures, also raised the question of allegiance.¹⁴² In Virginia, for example, shortly after enacting its treason law, the General Assembly passed “An Act for the punishment of certain offences,” defining a variety of offenses short of treason, including seditious libel, exciting the people to resist government, discouraging enlistment, and other offenses.¹⁴³ These crimes, which Blackstone had called “contempts . . . against the king’s person and government,” could also be regulated on a preventive basis, under a regime of “preventive justice.”¹⁴⁴ And, indeed, preventive regulation of sedition and treasonous misdemeanor was common during the Revolution, forming perhaps the mainstay of what Willard Hurst has described as the “[s]ummary executive action” so typical of the time.¹⁴⁵

The absence of allegiance was thus a natural defensive plea against charges of treason and related offenses. Aware of this, Attor-

141. *Id.* at 57. McKean nevertheless went on to instruct the jury that the state’s treason law implied a period of election in which individuals were free to join either side, and Chapman was discharged. Recognizing a period of free election was, says Chapin, an “act of grace,” but states generally recognized such a period, concluding in the passage of a treason law. CHAPIN, *supra* note 25, at 71–72.

142. Young, *supra* note 25, at 296; *see also* VAN TYNE, *supra* note 25 (providing the best study of these offenses in the context of the Revolution).

143. An act for the punishment of certain offenses, c.5, 9 STATUTES AT LARGE, *supra* note 1, at 170–71. The act was repealed and replaced by a similar statute in May 1780. An act affixing penalties to certain crimes injurious to the independence of America, but less than treason, and repealing the act for the punishment of certain offenses, c.14, 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 268–70 (William Waller Hening ed., 1822).

144. 3 TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 6, at 251. On the ideology of police offenses and preventive justice, *see* MARKUS DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 83–85 (2005).

145. JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES 83 (1945). To be sure, publicists described a similar principle under the law of war. Thus, according to Vattel, a nation at war could demand good behavior of unarmed *enemies*, disarming or even imprisoning those whom were not trusted. VATTEL, *supra* note 24, bk.III, c.VIII, §§ 147, at 353.

ney General Randolph would have had good reason to seek out the views of the General Court on the issue of Philips's allegiance. The judges, for their own part, might reasonably have expected that issue to come before them. Not only was it raised by the language of the act of attainder, which directed Philips's trial for treason, but such questions had come before English courts in a variety of postures for over 100 years, as evidenced by a variety of authorities they knew, including Calvin's Case.¹⁴⁶ If Randolph did inquire into the view of the judges of the General Court and discovered they harbored serious objections, he may have concluded that it was best not to proceed under the act of attainder at all, but bring a new indictment for a felony like robbery, which still carried a death sentence. This would account for both Jefferson's recollection that Randolph had declined to prosecute under the act, and Tucker's statement that the judges had refused to do so. As historian Henry Young has shown, it was the same path followed by state attorneys in Pennsylvania, tasked with prosecuting loyalists who had "operated as uninstructed guerrillas, rendering themselves liable to prosecution for nearly every felony."¹⁴⁷

B. The Problem of Belligerent Status

Philips had grounds for a second defensive plea as well, namely, that he was an enemy belligerent and entitled to protection under the customary law of war. Indeed, references to Philips's status under the law of war and the law of nations litter the record. When Patrick Henry first addressed the attainder at the Virginia ratifying convention in 1788, he suggested that Philips's treatment was justified by the law of nations.¹⁴⁸ Randolph picked up on the point in his response to Henry two days later, pointing out that Philips "had a commission in his pocket" when he was arrested, making him "therefore only a prisoner of war."¹⁴⁹ Marshall and Nicholas missed the issue in their comments, but Benjamin Harrison—who had been speaker of the House of Delegates when the bill of attainder passed—did address it, asserting that Philips "by the law of nations, was entitled to no privilege of trial."¹⁵⁰ Everyone with personal knowledge of the matter brought up

146. PAUL HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 32, 162–73, 205–06 (2010).

147. Young, *supra* note 25, at 296–98.

148. 9 DHRC, *supra* note 57, at 1038.

149. *Id.* at 1087.

150. *Id.* at 1127.

Philips's status under the law of war. It figured centrally as well in Jefferson's subsequent recollections of the case. In his first account, given to Wirt in August 1814, Jefferson noted that Philips had been "covering himself, without authority, under the name of a British subject," and that Randolph believed Philips would enter such a plea against the attainder, arguing that he was "a prisoner of war entitled the protection of the law of nations."¹⁵¹ He used similar language in a letter to Girardin the next year.¹⁵² And Randolph's *History*, written around the same time, asserted that Philips' "apology" to the charges against him was that "he had never for a moment acquiesced in the Revolution . . . but he received on the first opportunity, and acted under, a military commission from the crown."¹⁵³

If Philips had accepted a military commission from the crown "on the first opportunity," as Randolph stated, and had done so before he owed allegiance to Virginia, then it likely made him an enemy.¹⁵⁴ An enemy could not commit treason.¹⁵⁵ Moreover, a central commitment of the publicist tradition was that a captured enemy should be held as a prisoner of war, and could not be put to death or otherwise punished.¹⁵⁶ At the Virginia ratifying convention, Henry had raised this cluster of issues by describing Philips as "[a] pirate, an out-law, or a common enemy to all mankind."¹⁵⁷ Henry's language followed the *Commentaries*, where Blackstone had described a "crime of piracy" against the law of nations. The pirate, wrote Blackstone, "has renounced all the benefits of society and government, and has reduced

151. *Wirt Letter, 1814, supra* note 46, at 548–49.

152. *Girardin Letter, supra* note 8, at 337 ("[Philips] pleaded that he was a British subject, authorized to bear arms by a Commission from Ld Dunmore, that he was therefore a mere prisoner of war, and under the protection of the law of nations.") ("I recommend an examination of the records . . . I am not sure of . . . whether his plea of alien enemy was formally put in and overruled.").

153. RANDOLPH, *HISTORY, supra* note 92, at 268–69.

154. This was the conclusion reached by Chief Justice Thomas McKean in an advisory opinion for President Reed of Pennsylvania's Supreme Executive Council. *Letter or Opinion of C. J. McKean to Pres. Reed, 1779, 7 PENN. ARCH., 1ST SER. 644–46* (1853).

155. See COKE, *supra* note 134, at 10–11; 4 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 6, at 74–75.

156. See VATTTEL, *supra* note 24, bk.III, c.vIII, ss.140, 149, at 358– 59; see also HUGO GROTIUS, *DE IURE BELLI AC PACIS*, Liber III, Caput XIV 522 (1646) (stating that prisoners of war who surrender on condition of their safety are not to be put to death) ("Easdem ob causas vitam salvam paciscentium, sive in praelio, sive in obsidione non repudianda dedito."). On the publicist tradition and the treatment of prisoners, see generally KENT, *supra* note 24, Lec.V, at 88–89 (focusing on the publicist tradition and the treatment of prisoners); NEFF, *supra* note 24, at 147–51, 163–65, 194–98 (highlighting the theory of 'regular war' more generally); WITT, *supra* note 24, at 16–19.

157. 9 DHRC, *supra* note 78, at 1038.

himself afresh to the savage state of nature, by declaring war against all mankind.”¹⁵⁸ Society could, in self-defense, kill the pirate or outlaw, and states had created summary procedures for dealing with such cases. It was this label, then—*pirate*—that Randolph sought to rebut by raising the issue of the military commission. If Philips had possessed a military commission, as was rumored, then he was likely not a pirate, but a belligerent following British orders.¹⁵⁹

Jefferson was not present at the convention to hear this exchange between Henry and Randolph, but he seems to have perceived the issue, arguing in his letter to Girardin that the existence of a military commission was beside the point. Even if Philips had been commissioned, wrote Jefferson, “an enemy in lawful war *putting to death, in cold blood, the prisoner he has taken, authorizes retaliation*, which would be inflicted with peculiar justice on the individual guilty of the deed, were it to happen that he should be taken.”¹⁶⁰ Jefferson may have been referring to Vattel’s *The Law of Nations*, a work he had closely studied, which described “a kind of retaliation sometimes practiced in war, under the name of reprisals.” Reprisals were a dangerous business; according to the practice, the sovereign might respond to an enemy’s killing of innocent prisoners by “hang[ing] an equal number of his [i.e., the enemy’s] people . . . [and] notifying him that we will continue thus to retaliate, for the purpose of obliging him to observe the laws of war.”¹⁶¹ Yet Jefferson, apparently, found the idea compelling, or at least its logic difficult to resist, as he followed something like this course as Governor of Virginia in combating British-led “Indian warfare” in the western territories.¹⁶² Jefferson connected the

158. 4 TUCKER, BLACKSTONE’S COMMENTARIES *supra* note 6, at 71.

159. See VATTEL, *supra* note 24, bk.III, c.XV, at 403–05 (“The generals, officers, soldiers, privateersmen, and partisans, being all commissioned by the sovereign, make war by virtue of a particular order. . . . [I]t is an infamous proceeding . . . to take out commissions from a prince, in order to commit piratical depredations on a nation which is perfectly innocent with respect to them. The thirst of gold is their only inducement; nor can the commission they have received efface the infamy of their conduct, *though it screens them from punishment*.”) (emphasis added). I understand Vattel to be acknowledging that a commission might be used as ‘cover’ for piratical activity, not as authority for it; see also KENT, *supra* note 24, Lec.V, at 91 (according to Kent, citing Vattel, even an uncommissioned pirate could not be punished).

160. *Girardin Letter*, *supra* note 8, at 337.

161. VATTEL, *supra* note 24, bk.III, c.VIII, at 359.

162. See WITT, *supra* note 24, at 28–29, 33–37; see also 9 DHRC, *supra* note 78, at 1038 (stating that Jefferson was not the only of our figures to invoke such limitations. Patrick Henry, too, argued that, under the law of nations, Philips’s conduct exempted him from protection as a prisoner of war, due to “the enormity of his crimes.”); *id.* at 1127 (acknowledging that Benjamin Harrison also shared their views. Harrison had commented that Philips was “a man, who, by the law of nations, was entitled to no privilege of trial.”); VATTEL, *supra* note 24, bk.III, c.VIII, § 141, at 358 (“There is, however, one case, in which we may refuse to spare the life of an enemy

conduct of these “merciless Indian savages” on the western frontier to escaped slaves in the eastern Tidewater—slaves like those who had joined the Philips gang—and the analogy resounded deeply in Virginia.¹⁶³

The legal issues here are clearly quite complex, but (fortunately) we have no immediate need to referee them. Whether or not one accepts Jefferson’s argument, it is easy to see that Philips’s status engendered serious difficulties for a treason prosecution, since a prisoner of war could not normally be tried for treason.¹⁶⁴ If Randolph consulted the judges of Virginia’s General Court on this point, they may have expressed their view that the law of nations forbade a trial of Philips for treason, as ordered by the act of attainder—a use of the law of nations not unlike the one James Duane would make in the later case of *Rutgers v. Waddington*.¹⁶⁵ The issue was one the General Court was certainly competent to consider; King’s Bench in England had long determined prisoner of war status on petitions for writ of habeas corpus, and had even discharged enemy aliens charged with treason.¹⁶⁶ Randolph may have discovered that the judges would be amenable to hearing charges of robbery. Against robbery, a defensive

who surrenders It is when that enemy has been guilty of some enormous breach of the law of nations, and particularly when he has violated the laws of war”).

163. See DECLARATION OF INDEPENDENCE (1776) (“He has excited *domestic insurrections* amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the *merciless Indian Savages*, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”) (emphases added); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 79, 121 (1997); see also TAYLOR, *INTERNAL ENEMY* *supra* note 38, at 10 (discussing the parallel between Indian warfare and slave revolt in Virginia) (“In newspapers and pamphlets, American writers demonized the British as race traitors who allied with savage Indians on the frontier and fomented bloody slave uprisings in the South. By aiming and encouraging the supposedly barbaric red and black peoples, the British betrayed the white Americans, who claimed a unique capacity to enjoy freedom and sustain a republic.”); MARSTON, *supra* note 21, at 55. On Americans’ use of Vattel and the theory of regular war to normalize violent conflict in the project of state building, see Ian Hunter, ‘*A Jus gentium for America*’: *The Rules of War and the Rule of Law in the Revolutionary United States*, 14 J. HIST. INT’L L. 173, 178–91 (2012).

164. HALLIDAY, *supra* note 146, at 172–73 (describing describes one exception to the bar on trying prisoners of war for treason. In captivity, a prisoner of war became a ‘local subject’ of the sovereign, and could be tried for treason or felony for conduct after assuming that status).

165. *Rutgers v. Waddington* (N.Y. City Mayor’s Ct. N.Y. 1784), in 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 414–18 (Julius Goebel, Jr. ed., 1964) (discussing that the court gave force to the law of nations as part of the common law of the New York, effectively vindicating national treaty commitments); cf. *Respublica v. De Longchamps*, 1 U.S. 111 (1784) (McKean, C.J.) (describing the law of nations as part of the “municipal law” of Pennsylvania) (highlighting a similar case decided around the same time, but involving principles of substantive law). On the De Longchamps affair and the subsequent prosecution, see CASTO, *SUPREME COURT*, *supra* note 26, at 7–8, 132–33.

166. HALLIDAY, *supra* note 146, at 170.

plea that Philips was an enemy belligerent was unlikely to succeed, since belligerents were supposed to preserve the lives and property of unarmed civilians.¹⁶⁷

We should be able to see now why Randolph was so critical of the passage of the bill of attainder against Philips, despite the fact that it was suspensive in form. The case clearly involved complex factual and legal questions, several of which were contested. Was Philips a British subject? Did he have a military commission? Did that commission predate his obligation of allegiance to Virginia? Did Philips forfeit his right to protection as a prisoner of war by his treatment of civilians? The General Assembly had offered Philips no opportunity to appear and contest these issues before the bill passed. And after it passed, he could have far less hope to press a jury to his side. We should be able to see, as well, the rationale for courts refusing to enforce such acts, as envisioned by St. George Tucker.¹⁶⁸ In the case of a suspensive attainder for treason, the rationale did not turn on when Philips had been captured, and this explains why *everyone* involved failed to recollect the point—it did not matter.

IV. THE INSTITUTIONAL FORMS OF LAW IN CIVIL CONFLICT

The terms of dispute about Philips's attainder capture an evolution in the role of the assembly in the last decades of the eighteenth century; and the confusion this change could trigger when assembly procedures or powers were contested. Writing in July of 1776, Massachusetts lawyer and Yale graduate Joseph Hawley had described attainder in traditional terms, suggesting that "high treason ought to be

167. Vattel, *supra* note 24, at 362; see also Kent, *supra* note 24, at 87 (discussing additional defenses of this position, with some citations to publicist literature); Winthrop, *supra* note 12, at 1212, 1215 ("[I]t is forbidden by the usage of civilized nations, and is a crime against the modern law of war, to take the lives of, or commit violence against, non-combatants and private individuals not in arms As to [private property], the strict war right of seizure has been very materially qualified by modern usage. Private property . . . is now in general regarded as properly exempt from seizure except where suitable for military use or of a hostile character."). As I understand it, the General Court would not have heard prosecution for this offense under the law of war; the point is, rather, that such an offense would have made it unlikely that a jury would accept a plea of enemy status as a defense to the civil crime of robbery.

168. Taylor, *INTERNAL ENEMY*, *supra* note 38, at 87–89, 105–10. The presence of escaped slaves in the gang only strengthened the case for involving the courts, as Tucker knew first-hand the intransigence of the assembly on issues related to slavery. In 1796 he had proposed an elaborate plan to gradually eliminate slavery, but the plan was flatly rejected by the House of Delegates. As Alan Taylor describes it, Tucker retreated into a pro-slavery position, and as Judge of the Court of Appeals narrowed a crucial anti-slavery decision, *Wrights v. Hudgins*, issued by Chancellor George Wythe.

the same in all the United States;—*saving to the legislature of each colony or state the right of attainting individuals by an act or bill of attainder.*”¹⁶⁹ The behavior of “[o]ur stories,” thought Hawley, made this power necessary “for the general safety.”¹⁷⁰ The distinction implied that the state legislatures would be *subject to* a law of treason, applying that law to cases in the manner of courts, rather than punishing individuals arbitrarily. This view was still relatively common at the time, and shortly after Hawley’s letter we find it expressed in the influential treatise Hatsell’s *Precedents*. Hatsell described the bill of attainder as “an extraordinary power,” a “deviation from the more ordinary forms of proceeding by indictment or impeachment” appropriate “where, from the magnitude of the crime, or the imminent danger to the state, it would be a greater public mischief to suffer the offense to pass unpunished, than even to over-step the common boundaries of the law.”¹⁷¹ Such was the case with the “most powerful offenders.” Jefferson, likely under Hatsell’s influence, described this same use for bills of attainder, observing, in a letter to Girardin, that Philips had been “too powerful to be arrested by the sheriff and his posse comitatus. . . .”¹⁷² Patrick Henry, too, had sounded this note in defending bills of attainder in the state constitutional convention of 1776, expressing concern for “some towering public offender against whom ordinary laws would be impotent.”¹⁷³

This perspective on the bill of attainder fit quite naturally with at least one of the republican conceptions of the constitutional place of the assembly. Matters of war and peace were, by the 1760s, firmly in the hands of metropolitan institutions, but threats to civil government or the domestic police of individual colonies were regularly handled by governor, council and assembly.¹⁷⁴ Maintaining security and government were royal obligations, and naturally discharged in individual colonies by assemblies, usually royally chartered bodies. When, sev-

169. *Letter from Joseph Hawley to Elbridge Gerry (July 17, 1776)*, in 4 *THE FOUNDERS’ CONSTITUTION* 430 (Philip P. Kurland & Ralph Lerner eds., 1987) (emphasis added).

170. *Id.*

171. 4 JOHN HATSELL, *PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS* 89–90 (3d ed. 1796) (1781).

172. *Girardin Letter*, *supra* note 8, at 336.

173. RANDOLPH, *HISTORY*, *supra* note 92, at 255.

174. See JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 50–51 (2011); ANDREW C. McLAUGHLIN, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 133–38 (1961); see also HULSEBOSCH, *supra* note 25, at 103–04, 347 n.146 (discussing Ethan Allen’s attainder and the role that provincial governments might play within the empire in ensuring domestic security); Steilen, *supra* note 2, at 832–35.

eral decades later, colonies began to reconstitute themselves as republican states, their assemblies continued to take on matters of police and justice, and Jefferson, for one, thought the assembly to be their proper home.¹⁷⁵ As one commentator recently put it, Jefferson “went about the project of constituting a republican polity by relocating and transforming the power of sovereign judgment and its jurisdiction within constitutional structure to varied assemblies of the people.”¹⁷⁶ Of course, not all the institutions of the imperial constitution could be jettisoned. The new republican states, Jefferson thought, required a national body (that is, an imperial body) to support the union and adjudicate disputes.¹⁷⁷ Federal institutions were thus internal to Jefferson’s republicanism. Also internal were constraints imposed by law, given effect in a variety of institutional forms. The constraint of law was especially important when it came to matters of treason. Writing to George Wythe in 1778, Jefferson recommended model language for a state treason statute that prohibited both the assembly and the courts of law from declaring constructive treasons.¹⁷⁸ Treason law had to be given (in the words of a modern commentator) “firm definition,” even if state assemblies were to retain the power to attain by bill, in order to ensure domestic security and cure failures in civil process.¹⁷⁹ This was, more or less, the same view Joseph Hawley had endorsed: a uniform substantive law of treason, supplemented by a power in each assembly to attain.

It would take only a few decades for this view of the bill of attainder to weaken considerably, while at the same time a transformation in the constitutional role of the assembly was occurring. Writing in the years around 1810, Edmund Randolph observed in his *History* that the assembly’s power to attain derived “from some connection

175. See generally 1 THE PAPERS OF THOMAS JEFFERSON 342 (Julian P. Boyd ed., 1950). (discussing Jefferson’s first draft of a constitution for Virginia, which provides that an administrator “shall possess the powers formerly held by king,” but excludes the prerogative powers of “Declaring war or peace,” “issuing letters of marque or reprisal,” and “erecting courts,” among others, which are “to be exercised by the legislature alone.”).

176. Crow, *supra* note 120, at 168; see also BILDER, *supra* note 25, at 73–83 (expressing concerns with equity as Crow describes, equity’s intolerance of hardship and obstruction of justice grew out of the royal obligations to address these sufferings, and drew on royal authority to address obstructions of justice, adjust procedural requirements and ignore technical failures in pleading. These were leading themes in equity jurisprudence, and Jefferson made note of them in his study of that body of law); Edward Dumbauld, *Thomas Jefferson’s Equity Commonplace Book*, 48 WASH. & LEE L. REV. 1257, 1273–80 (1991).

177. See Leonard, *supra* note 124, at 372–73; PETER S. ONUF, THE MIND OF THOMAS JEFFERSON 74–75 (2007).

178. *Bill to Attain*, *supra* note 1, at 493–94.

179. See HURST, *supra* note 145, at 87–89.

with the character of grand inquest of the Commonwealth.”¹⁸⁰ This was a rather traditional, legal view of the bill of attainder. The English House of Commons had begun to describe itself as a grand inquest in the 1620s to justify its role in impeachment, a process universally regarded as a form of judicature.¹⁸¹ And it was judicature in the General Assembly that most worried Randolph, since it posed a risk of “confounding . . . judicial with legislative authority.” And yet, in the nearly the same breath, Randolph also suggested that the General Assembly’s power to attain “may probably exist in the sphere of Virginian legislative power, *as an attribute to legislation itself*. . . .”¹⁸² Side-by-side the two views of attainder made little sense. If attainder was an attribute to legislation, then how did it pose a danger of confounding judicial and legislative powers?

The view that a bill of attainder was a kind of legislation, as opposed to a summary legal procedure, gathered considerable strength in the last decades of the eighteenth century. It proved attractive to lawyers engaged in marking out a new role for courts of law in American constitutional systems. We have seen already how St. George Tucker supported this role from a relatively early period. It is unsurprising, then, that in his annotations to the *Commentaries* he described the bill of attainder as “a legislative declaration of guilt.”¹⁸³ They were arbitrary, dispensing entirely with “legal forms, legal evidence, and . . . every other barrier which the laws provide against tyranny and injustice in ordinary cases,” and thus are put to “nefarious purposes” in every age.¹⁸⁴ Jefferson would later call Tucker’s account a “diatribe,” but others took the same view. James Wilson’s *Lectures on Law*, written around the same time as Tucker’s annotated *Commentaries*, described bills of attainder as “legislative verdicts.”¹⁸⁵ Bills of attainder were not an expression of general will, or the reasonable public opinion—the proper objects of laws enacted by a popular legislature—but private, factional will.¹⁸⁶ Attainder in the assembly thus

180. RANDOLPH, HISTORY, *supra* note 92, at 269.

181. See Plucknett, *supra* note 61, at 47.

182. RANDOLPH, HISTORY, *supra* note 92, at 269 (emphasis added).

183. 4 TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 6, at 293.

184. *Id.* at 293–94.

185. James Wilson, *Lectures on Law*, Part II, Lecture VI, in 2 THE WORKS OF JAMES WILSON 548 (Robert Green McCloskey ed., 1967) (1790).

186. See Philip Pettit, *Two Republican Traditions*, in REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 169, 186–88, 199 (Andreas Niederberger & Philipp Schink eds., 2013) (discussing the depository of popular sovereignty in an assembly whose acts express the general will is characteristic of what Philip Pettit has called the “Franco-German tradition of republicanism,”

became a leading example of the legislative excesses of the 1780s, against which the leading Federalists complained and for which they prescribed judicial review as a necessary brake. In Federalist 78, Alexander Hamilton included the bill of attainder among the “specific exceptions to the legislative authority” which “can be preserved in practice no other way than through the medium of the courts.”¹⁸⁷ On this understanding, then, bills of attainder implicated the separation of powers not because they confounded judicial and legislative functions—they were purely legislative—but because they tested the independence of the judiciary, upon which the efficacy of a constitutional ban would depend.

In this way, Federalists were now claiming for the courts of law an interest in the royal authority that had been deposited in popular assemblies after independence. The assembly of the 1770s had assumed what were, under the imperial constitution, curial or conciliar tasks: managing the allocation of authority throughout the dominions and the forms that ‘the law of the land’ would take in various institutional settings.¹⁸⁸ But the conduct of the assembly, especially in matters of domestic police and the civil administration of justice, showed the inadequacy of the arrangement. For this there were a number of remedies, but principal among them was the common-law court, or, more precisely, the form that law took in the common-law court. Courts called on to play this constitutional role employed natural law with particularly great effect; although principles of natural law had long been relevant, even in English courts, they now became central to an emerging judicial doctrine of implied limitations on legislative power.¹⁸⁹ To secure this package of institutional and doctrinal reforms, proponents argued that *law* was the proper repository of *courts*, and that the forms and processes employed by the popular assembly were not, in fact, *properly regarded as law at all*, but instead arbitrary expressions of factional will. Lost was any sense that a sovereign people met in assembly was possessed of a *sui generis* body of

associated in particular with Rousseau). On “public opinion” and the French Enlightenment, see COLLEEN A. SHEEHAN, JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT 63–66, 79–83 (2009).

187. THE FEDERALIST No. 78 (Alexander Hamilton), in ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY THE FEDERALIST, at 429 (Benjamin Fletcher Wright ed., 1961).

188. See generally HALLIDAY, *supra* note 146, at 137–76 (stating that after the Glorious Revolution, some of the conciliar functions related to the suspension of ordinary forms of law were delegated by Parliament to the King’s councils).

189. R. H. HELMHOLZ, NATURAL LAW IN COURT 142–70 (2015).

law suited to times of crisis and disorder. The rule of the common law became, in effect, the rule of law *simpliciter*.¹⁹⁰

Jefferson, always hard to pin down, moved in a somewhat different direction, and in this respect he presaged another major institutional development to come. Jefferson had never believed in a human faculty of reflective reason, supposedly promoted by the form of proceedings in a court of law; for him, the reason of a people was organically connected to a particular time and place, and to a shared body of experiences.¹⁹¹ The assertion of federal jurisdiction over the law of nations in the 1790s evidenced, in Jefferson's mind, how judicial proceedings could be used to partisan ends.¹⁹² The natural repository of the reason of a people was thus not the judiciary, but the legislature. If the legislature should need to be checked by another institution, the preferable alternative was a fully coordinate *executive*, whose connection to all the people would be renewed at times of crisis by their mobilization through political parties.¹⁹³

CONCLUSION

The Case of Josiah Philips is a wartime case, but it is also a record of our efforts to construct a fundamental law of wartime. It involves inaccuracy, but it is not, at its heart, a case about lying. The subsequent history of the case well illustrates the mode of historical understanding that characterized the construction of fundamental law in eighteenth-century America. Americans sought to understand the imperial civil war into which they had been plunged by situating the ex-

190. Cf. Alan Cromartie, *The Rule of Law, in REVOLUTION AND RESTORATION: ENGLAND IN THE 1650s*, at 55, 57–61 (John Morrill ed., 1992) (comparing this to the posture assumed by common lawyers in the disputes leading up the English Civil War, who elevated the common law to constitutional status despite the desire for law reform and public hatred of common lawyers).

191. See SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 90–100 (1990).

192. See also CASTO, *SUPREME COURT*, *supra* note 26, at 130–41, 147–52; Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 131, 152–55; Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 263 (1986) (noting definitions of what the ‘national interest’ or ‘public order’ were most frequently involved heated political controversy.”); GOEBEL, *supra* note 26, at 624 (ironically, it was Jefferson himself who apparently suggested that federal judges enforce the law of nations in federal criminal proceedings).

193. Leonard, *supra* note 124, at 383–87 (adding that like Governor Henry, President Jefferson sought ratification for his emergency actions in the legislature, and in Jefferson's case, this was premised on his view of the action as extraconstitutional and ultra vires); see, e.g., Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24–27 (1993).

perience within a familiar historical framework.¹⁹⁴ That framework was largely defined by a common law triumphant over arbitrary government.¹⁹⁵ The bill of attainder rested on a long tradition, but it never held a firm position in this framework.¹⁹⁶ This did not make it any easier to describe a satisfactory alternative regime. Americans knew meanings for “legislative” and “executive,” but disagreed about their content, and struggled to connect these ideas to familiar English institutions in a way that accomplished the concrete tasks of government at war. They carried on their deliberations about how best to design institutions in a period that only recently had seen the rise of legislative reporting, which remained unreliable and even fictive in its methods.¹⁹⁷ And their arguments evolved rapidly, as changing conditions altered the terms of constitutional persuasion. If we cannot square the corners of the Case of Josiah Philips, then, we should not be surprised; but that does not mean it has nothing to tell us.

194. See COLBOURN, *supra* note 58, at 21–56; McCONVILLE, *supra* note 21, at 266–74; John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, in *THE ROOTS OF LIBERTY* 147, 149, 156–58, 181–87 (Ellis Sandoz ed., 1993).

195. McCONVILLE, *supra* note 21, at 274.

196. Steilen, *supra* note 2, at 772–73.

197. BILDER, *supra* note 78, at 19–34.